83-1481 (1)
No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, et al.,
Petitioners,

vs.

CHARLES CLARK, Director of the
Department of Health for the State of Hawaii,
Individually and in his Official Capacity,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIDNEY M. WOLINSKY
COUNSEL OF RECORD
ANITA P. ARRIOLA
Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430
ROBERT M. HARRIS
HARRIS & SMITH
201 Model Progress Building
1188 Fort Street Mall
Honolulu, Hawaii 96813
(808) 537-5502
Counsel for Petitioners
Assisted by
DAVID L. AINBENDER
Law Student

March 5, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

75 pp

QUESTIONS PRESENTED

1. Whether elderly and disabled Hansen's Disease (leprosy) patients living at a facility provided by the state for over three decades are entitled to any due process protections before a state agency terminates all utilities and services to force the patients to move.

2. Whether a state agency may threaten the lives of elderly Hansen's Disease (leprosy) patients still living in a state-run facility by depriving them of all essentials of life, including water, electricity, withdrawal of life-sustaining medication, food and telephones, when other alternatives, such as judicial eviction proceedings, were available.

3. Whether the court below correctly ruled that *O'Bannon v. Town Court Nursing Center* as a matter of law precludes any disabled or elderly litigants from showing the existence of transfer trauma (risk of increased mortality and morbidity when elderly patients are moved) as a constitutionally cognizable interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

Cases

Constitutional Provisions

Statutes

Rule

Treatises

Law Review Articles

Other Authorities

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, et al.,
Petitioners,

VS.

CHARLES CLARK, Director of the
Department of Health for the State of Hawaii,
Individually and in his Official Capacity,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

This is a petition for a writ of certiorari to issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on September 7, 1983, which affirmed a decision of the United States District Court for the District of Hawaii.

The opinion of the Ninth Circuit, which appears in the Appendix hereto ("App.") (at 12, *infra*), is reported at 720 F.2d 564 (9th Cir. 1983).

Two prior opinions of the Ninth Circuit in this proceeding also appear in the Appendix. The opinion in *Brede v.*

Director for the Department of Health appears at App. at A-1, *infra,* and is reported at 616 F.2d 407 (9th Cir. 1980). The opinion in *Punikaia v. Yuen* is unreported and is reprinted at App. at A-29, *infra.*

The order of the Ninth Circuit on the motion for rehearing *en banc* dated December 6, 1983, is presently unreported and is reprinted at App. at A-28, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 7, 1983. A timely petition for rehearing *en banc* was denied on December 6, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Amendment XIV, § 1.

Hawaii Revised Statutes, §§ 326 *et seq.*
42 U.S.C. § 247e.

Pursuant to Rule 15.1(f) of the Rules of this Court, the text of the foregoing constitutional provisions and statutes is set forth in the Appendix hereto at A-35 to A-49.

STATEMENT OF THE CASE

A. Summary

Petitioners are Hansen's Disease (leprosy) patients who have undergone a lifelong struggle against physical disability, psychological trauma and social stigma. The statutes of Hawaii refer to Petitioners as "a living memorial to a long history of tragic separation, readjustment and endurance." H.R.S. § 326-40; App. at A-47. Indeed, there is

probably no other group in the history of mankind that has been for so long forcibly ostracized for no fault of their own. This dwindling group, with a history of purposeful unequal treatment, constitutes precisely the type of "discrete and insular" minority which this Court has long held is entitled to heightened judicial protection.

No case of which Petitioners are aware, dealing with the relocation of elderly men and women, involved measures which even approach the brutal coercive tactics employed by the Hawaii Department of Health in removing the Hansen's Disease patients from their home at Hale Mohalu. The cases dealing with "transfer trauma" all discuss the traumatic effect of a move on the assumption that the transfer is carried out in a humane fashion. Such cases are concerned with the more subtle but nonetheless serious losses occasioned by transfer, such as the disruption of ties to close friends and loss of familiar surroundings. Petitioners know of *no* instance where a governmental body has been so audacious as to force patients out from a nursing home or hospital by terminating all utilities and all services without a judicial hearing while the patients remain within. For petitioners, the harms normally associated with transfer trauma were overshadowed by the immediate and life-imperiling deprivations the state inflicted upon them during what could best be described as a "pre-dawn raid".

The decision below officially sanctions the use of life-threatening force against elderly and disabled persons by a state bureaucracy entrusted with the care and health of such persons. If allowed to stand, the decision represents a shocking failure of the legal system to protect the least powerful members of our society.

This case presents pure questions of law. Petitioners were never permitted to have a day in court. Each of the issues now presented to this Court arose in the context of a summary judgment granted against them as a matter of law.

B. Facts

Since the late 1940's, the State of Hawaii has maintained a residential leprosy treatment facility called Hale Mohalu, near Pearl Harbor, Oahu.[1] Petitioners are victims of leprosy who utilized this facility, many for over a quarter of a century, under Hawaii statutes that provide for their treatment and care.[2] Hale Mohalu became both the Petitioners' home and community (RT 146/8-15; 300/25; 302/9; 304/16 - 305/12). In 1978, after allowing conditions to deteriorate, the state Department of Health ("the Department") closed the home and forcibly terminated all services, even though Petitioners still lived there. App. at A-14. In response, petitioners brought the instant suit.

Petitioners are all elderly men and women who contracted the disease when they were young, before effective treatment was developed. They are among the more afflicted of the leprosy population and suffer from numer-

---

[1]Leprosy, which is correctly known as Hansen's Disease, is a mildly infectious degenerative disease which produces lesions in the skin, mucous membrane and peripheral nervous system. In its more advanced stages, it affects internal organs and renders its sufferer vulnerable to other diseases such as diabetes and cancer. *See Dorland's Illustrated Medical Dictionary,* 849 (25th ed. 1974).

[2]*See* App. at A-35 to A-48.

ous debilitating illnesses.[3] App. at A-4. Under the isolation laws at the time, many of these people were forcibly taken from their families as young children (RT 300/25-302/9). The Hale Mohalu facility became home for these people subjected to compulsory segregation.

The Hale Mohalu facility was originally established on federal land. In 1956, the United States, which is by federal law required to care for those with Hansen's Disease,[4] conditionally conveyed title of the 11-acre parcel to Hawaii, subject to a 21-year right of re-entry. Two major conditions were that the property permanently be used for leprosy patients and that existing facilities be maintained. Immediately after they obtained title, state bureaucrats, after allowing conditions to deteriorate, tried to close the Hale Mohalu facility and force its residents to transfer to Leahi Hospital in Honolulu. App. at A-14. Before making this decision, the Department did not (1) fairly advise the patients of their intention to close Hale Mohalu and transfer the patients to a hospital; (2) provide the patients with any reasons therefor; or (3) give the patients any opportunity to object.

The patients opposed the Department's plan. They feared the dangerous, potential adverse health effects of "transfer trauma" which a relocation might cause. Also, the Leahi facility, with its sterile hospital environment and location away from shops or services, was ill-suited; the

---

[3]For example, one patient, Frank Duarte, contracted leprosy in 1938, and another, Paul Harada, has had it since 1941 (RT 173/10; 123; 124-125/5; 150/16-25). No feeling in the extremeties, amputations and diabetes are among the common maladies suffered by Petitioners. Several are restricted to wheelchairs.

[4]42 U.S.C. § 255 (now 42 U.S.C. § 247e) provides for care of leprosy victims by the federal government. App. at A-47.

Hale Mohalu facility, in contrast, provided the residents with spacious grounds and a warm, non-hostile environment.

Hale Mohalu was technically closed on January 26, 1978. App. at A-13. A majority of the patients, having no acceptable place to go, remained at Hale Mohalu. The state provided services until September 1, 1978. On that day, instead of seeking a court order for the transfer, state officials resorted to life-threatening self-help to forcefully coerce the patients to transfer. State employees arrived at 6:00 a.m. and ordered the nurses to leave. All medicines were removed, and the patients were told that no food service would be provided. Electrical lines were cut and removed, the main water valve was closed and shackled, and the telephone was ripped out of the wall. (RT 358/19 - 365/25; 553/17; 619/19 - 621/5; 827/17 - 828/1; 119/12 - 121/7).

Following this early morning raid, all state employees left the grounds. In their wake they left one patient who had been on kidney dialysis (RT 127/72 - 129/17; 133/1 - 133/4), one who was a diabetic and required daily insulin injections (RT 118/25 - 119/11), and others who, despite crippled hands, now had to change their own bandages (RT 156/2 - 156/5). A physician treating some of the patients testified that the Department's actions created life-threatening conditions. (RT 233/4-235/6). With no medical supplies, lights, or telephone to call for help in an emergency, these elderly people were helpless.[5]

---

[5]For example, when one patient began to hemorrhage during the night, the other patients had no lights by which to see or phone to call for an ambulance. Fortunately, the patients were able to call an ambulance with a walkie-talkie, and the sick patient was rushed unconscious to a hospital where he arrived in critical condition. (RT 365/24-367/16).

C. Proceedings and Rulings Below

On September 5, 1978, the Petitioners filed a complaint in the U.S. District Court to enjoin the Department from closing Hale Mohalu, raising substantial federal due process and 42 U.S.C. § 1983 claims. The complaint was dismissed for "lack of standing" on September 21, 1978. Petitioners appealed and the first of three Ninth Circuit panels to hear the case reversed. App. at A-1. The court found that "[t]he state has statutorily conferred upon leprosy patients an entitlement to treatment . . .," *id.* at A-7, and that "[t]o the extent . . . that transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients, relocation may constitute a deprivation cognizable under the due process clause." *Id.* at A-9.

On remand, the district court denied Petitioners' motion for preliminary relief. Again, Petitioners appealed. A second, different Ninth Circuit panel reiterated the holding in *Brede,* and remanded again in an unpublished order. App. at A-29.

Upon remand, Petitioners moved for partial summary judgment on their due process claims. The district court not only denied the motion, but *sua sponte* entered summary judgment in favor of the state. Petitioners appealed. This time another panel of the Ninth Circuit affirmed. App. at A-12. On December 6, 1983, the court denied Petitioners' petition for rehearing. App. at A-28.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW SERIOUSLY MISCONSTRUES AND EXTENDS O'BANNON v. TOWN COURT NURSING CENTER AND FINDS THAT DIRECT DEPRIVATIONS OF LIFE AND LIBERTY BY THE GOVERNMENT ARE NOT SUBJECT TO ANY DUE PROCESS SAFEGUARDS; THE DECISION BELOW THUS REMOVES LONGSTANDING CONSTITUTIONAL SAFEGUARDS FOR RESIDENTS OF GOVERNMENT-RUN INSTITUTIONS

The Ninth Circuit's holding purports to rest squarely on this Court's decision in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980).[6] In fact, the decision below reads out of existence the central holding and critical limiting principle of *O'Bannon*. The court below, admitting that *O'Bannon* is not direct authority because it involved a private facility, nevertheless found that *O'Bannon* controls this case. App. at A-19. The decision below rejects this Court's central distinction between direct and indirect gov-

---

[6]Due to factual conflicts which would otherwise preclude summary judgment, the court below relied directly on *O'Bannon, supra*, to affirm as a matter of *law* the district court's *sua sponte* grant of summary judgment. App. at A-20. The court below also used *O'Bannon* to justify its departure from the law of the case as established by two prior and different panels of the Court of Appeals. *See* App. at A-21; *see also* Statement of the Case at 7, *supra*. The opinion below not only re-writes the majority opinion of Justice Stevens by ignoring the direct-indirect distinction so carefully crafted into that opinion, but also ignores the concurring opinion of Justice Blackmun. The opinion below totally rejects Justice Blackmun's "four distinct considerations" which led him to concur, and also ignores the concurring opinion's view that it would find a liberty interest at stake whenever "a governmental decision . . . imposes a high risk of death or serious illness . . ." 447 U.S. at 802.

ernmental deprivations of liberty or property. Because this application of *O'Bannon* is so incorrect and extreme, and its implications so far-reaching, this Court should grant certiorari to reconcile the significant conflict between the opinion below and *O'Bannon*, and the dangerous extension of both the majority and concurring opinions.

O'Bannon held that nursing home residents have no due process rights to a pretermination hearing when their private facility is decertified for Medicaid benefits by the federal government. 447 U.S. at 790. The action of the government there was directed against the private nursing home and did not involve the withdrawal of *direct* benefits. *Id.* at 787. Any impact on patients in *O'Bannon* was only an incidental effect of the government's attempt to prevent substandard care.

Despite the clarity of *O'Bannon*, the Court of Appeals refused to follow this crucial distinction. The decision below, for the first time in the jurisprudence of this country, sanctions government action against its own citizens which *directly* deprives those citizens of their legal rights without due process, and thus also conflicts with this Court's decision in *O'Bannon*.

O'Bannon was, or should have been, definitive: "[W]e hold that the enforcement by HEW and DPW of their valid regulations did not *directly* affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." 447 U.S. at 790 (emphasis added). In stark contrast, this case involves local government agency actions directed at petitioners, with direct adverse impact on them. Here, the Department is

closing its own home and medical facility. There is nothing indirect about what the state did here. Their actions were aimed directly at the residents with Hansen's Disease.

The crux of *O'Bannon* is that the patients' problems were caused by the nursing home which allowed conditions to deteriorate. In fact, the Court suggested the possibility of damages against the nursing home. 447 U.S. at 787. However, here the state operated the home and allowed conditions to deteriorate. The Department and no third party was responsible for every act of which petitioners complain.

Moreover, the government agency not only ran the residence but both ordered and carried out the forcible transfer of petitioners. This is critically different from *O'Bannon,* where the patient transfers were the indirect effect of decertification. As this Court held, such indirect effect ". . . is not the same for purposes of due process analysis as a decision to transfer a particular patient . . . ." 447 U.S. at 786.

Despite these constitutionally significant differences,[7] the Court of Appeals found that "*O'Bannon* controls the dis-

---

[7]Among other numerous differences, the total absence of any due process sets this case apart from *O'Bannon.* As Justice Blackmun observed (concurring), "[t]he home has been afforded substantial procedural protections, and, throughout the process, has shared with the patients who wish to stay there an intense interest in keeping the facility certified." 447 U.S. at 797. Thus, the home served as a representative of the patients. *Id.* Also, HEW requires patient interviews as a part of its periodic review of a facility's qualification and thereby provides patients with input. *Id.* at 784 n.15.

Moreover, decertification involves enforcement of specific statutory and regulatory standards. In the present case, however, the state's decision to close Hale Mohalu was unrestrained by any standards, statutory or otherwise.

position of this case." App. at A-19. The court below, which found the state's decision to close Hale Mohalu "closely analogous" to the government's decertification of a private hospital for failure to maintain minimum health and safety standards," *id.* at A-20, demonstrates that it completely misunderstood, or simply rejected, this Court's decision in *O'Bannon.* It then used *O'Bannon* as a springboard to create novel and dangerous constitutional doctrine.

In *O'Bannon,* the Court reiterated the principle that due process safeguards do not apply to the indirect adverse effects of governmental action. 447 U.S. at 789. The court below turns this principle on its head and incredibly holds that due process does not apply when individuals suffer the direct adverse effects of governmental action. App. at A-27.

Indeed, the Court of Appeals' application of *O'Bannon* is so extreme that the decision below conflicts with all other courts which have interpreted *O'Bannon.* All others until now have adhered to the "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affect the citizen only indirectly . . . ." 447 U.S. at 788.[8]

---

[8] *O'Bannon* previously has been found controlling *only* where the government action indirectly affects the individual. *See, e.g., Grove City College v. Bell,* 687 F.2d 684, 704 (10th Cir. 1982), *cert. granted,* 103 S.Ct. 1181 (1983) (No. 82-825, 1982 Term) (no pretermination hearing required for students where private college's eligibility for financial aid terminated); *Geriatrics Inc. v. Harris,* 640 F.2d 262, 264 (10th Cir. 1981), *cert. denied,* 454 U.S. 832 (1981) (decertification of private nursing home); *Dima v. Macchiarola,* 513 F.Supp. 565, 568-89 (E.D.N.Y. 1981) (transfer of handicapped students merely indirect effect of city's refusal to renew contract

(footnote continued on next page)

This is not the first time that the Ninth Circuit has seriously misapplied *O'Bannon*. In *Bumpus v. Clark*, 681 F.2d 679 (9th Cir. 1982), *reh. denied and opinion withdrawn*, 702 F.2d 826 (9th Cir. 1983), residents of a county-owned nursing home sought to enjoin the closing of the home by the county. The court stated that *O'Bannon* "precludes a holding that the County's decision to close Edgefield and the State's refusal to step in and preserve the status quo are sorts of direct state action which constitute deprivations of life or liberty". 681 F.2d at 686. The court found no difference between indirect decertification and the state's decision to close its own facility, holding that "the County's action in this case no more directly affects plaintiffs than did the action of the State in *O'Bannon* . . . ." 681 F.2d at 686. The Ninth Circuit later withdrew its opinion in *Bumpus, supra*, finding the case moot. 702 F.2d 826 (9th Cir. 1983).

This Court should grant this petition for certiorari in order to insure that its decision in *O'Bannon* is not ren-

---

(footnote cont'd.)

with private school); *Heille v. City of St. Paul, Minn.*, 512 F.Supp. 810, 815 (D. Minn. 1981), *aff'd*, 671 F.2d 1134 (8th Cir. 1982); *Caton v. Barry*, 500 F.Supp. 45, 52 (1980) (governmental decision to terminate contractual relationship with private shelter for homeless).

O'Bannon has until now been found inapposite in cases involving direct government action. *See, e.g., Spivey v. Barry*, 665 F.2d 1222, 1228 (D.C. Cir. 1981) (closing of public health clinic); *Jeffries v. Georgia Res. Fin. Auth.*, 503 F.Supp. 610, 616 (N.D. Ga. 1980), *aff'd*, 678 F.2d 919 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 302 (1982) (property interest exists where agency's termination procedures directly affect plaintiffs' receipt of federal rent subsidies); *Swann v. Gastonia Housing Authority*, 502 F.Supp. 362, 366-67 (W.D. N.C. 1980), *aff'd in part, rev'd in part*, 675 F.2d 1342 (4th Cir. 1982). *Cf. Copisto v. Califano*, 89 F.R.D. 374, 379-80 (D.N.J. 1981).

dered meaningless and is properly applied within the boundaries delineated by the Court.

II

THE COURT BELOW FOUND AS A MATTER OF LAW THAT A STATE'S TERMINATION OF ALL ESSENTIAL UTILITIES AND WITHDRAWAL OF LIFE-SUSTAINING MEDICATIONS DO NOT CONSTITUTE A DEPRIVATION OF THE PATIENTS' INTERESTS IN LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS

The first Ninth Circuit panel to hear this case found that Hawaii "has statutorily conferred upon leprosy patients an entitlement to treatment at some state leprosarium". App. at A-7. Indeed, Hawaii obtained the land from the federal government after World War II only by promising (a) to maintain the existing Hansen's Disease facilities, and (b) to build a "permanent" leprosarium. The court recognized that this "entitlement to treatment . . . requires a measure of due process protection which may not have been provided in this case." App. at A-8. It is axiomatic that the state's deprivation of services and removal of medication and medical staff constituted a deprivation of the patients' entitlement to care and treatment.[9]

[9]The court below found no deprivation because the state provided alternative facilities. App. at A-20. The Department gave petitioners the "choice" usually presented by street thugs—relinquish your property or risk losing your life. These alternative facilities were in no meaningful sense available options for the patients in light of the risk of suffering adverse physical effects caused by being forcibly moved. As the *Brede* court recognized, the very risk of increased morbidity and mortality, one aspect of which is sometimes known as "transfer trauma", requires a pre-termination hearing. App. at A-9. Thus, petitioners were entitled to continue to receive care and treatment at Hale Mohalu until some hearings were held on the transfer trauma issue.

This court has recognized that the "right to be free from . . . unjustified intrusions on personal security" is among the historic liberties protected by the due process clause of the Fourteenth Amendment. *Ingraham v. Wright,* 430 U.S. 651, 673 (1977). *See also Grosjean v. American Press Co.,* 297 U.S. 233, 244 (1935) ("word 'liberty' contained in [the fourteenth] amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well").

Taken together, the *Brede* panel's decision and the decisions of this Court establish that Petitioners have fundamental rights of entitlement to care and treatment, of personal security, and of life itself. By unnecessarily and knowingly threatening the health and lives of Petitioners, the Department infringed on all of these substantive rights.

Restrictions on fundamental rights can only be justified by compelling state interests and the means chosen to affect these interests must be narrowly drawn, or in other words, they must be "least drastic means." *See, e.g., Roe v. Wade,* 410 U.S. 113, 155 (1973); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 101 n.8 (1971). *See also Beller v. Middendoct,* 632 F.2d 788, 807-08 (9th Cir. 1980), *reh. denied sub nom. Miller v. Rumsfeld,* 647 F.2d 80 (9th Cir. 1981), *cert. denied,* 454 U.S. 855 (1981), *reh. denied,* 454 U.S. 1069 (1981). Assuming *arguendo* that the bureaucracy possessed a compelling interest in closing Hale Mohalu, this interest could have been easily effectuated without threatening Petitioners' lives. For example, officials from the Department of Health could have sought a court order directing the patients to vacate by a certain date; if the patients continued to resist, law enforcement personnel would have

escorted the patients off the property. This would have been far safer than "pulling the plug" while helpless and elderly patients continued to occupy the facility.

Even if the patients' liberty interests are not deemed "fundamental" and no infringement of their fundamental right to life is found, the state's termination of utilities and withdrawal of medication still fail to pass constitutional muster because these actions do not bear a rational relation to the asserted government interest. *See, e.g., Whalen v. Roe,* 429 U.S. 589, 596-98 (1978). *See also Beller,* 632 F.2d at 808. Even if the state could lawfully close Hale Mohalu without holding a pretermination hearing, it was arbitrary and totally unreasonable for it to do so while ailing and elderly patients continued to reside at the facility. In short, it was unreasonable for the Department to threaten Petitioners' lives by depriving them of water, light and medication in order to close Hale Mohalu.

As described above, the state could have easily had the patients removed before it terminated services. The tactics used by the state in this case clearly bear no rational relation whatsoever to the state's interest in protecting Petitioners' health. The state in effect asserts, and the court below was apparently in agreement, that it should be allowed to board up and close down a building even though people remain inside, in order to "protect" these people. Such arbitrary, irrational and unrestrained exercise of government authority is not entitled to receive a judicial stamp of approval.

This case thus poses the issue of the extent to which this society will constitutionally tolerate arbitrary government action which unreasonably and unnecessarily imperils life.

In a case such as this, where elderly and sick individuals are involved, the state's actions are especially alarming. Denying these people food, water and medical necessities "shocks the conscience". *See Rochin v. California,* 342 U.S. 165, 172 (1952). Indeed, the Hawaii Health Department treated these frail and long-suffering people worse than criminals could lawfully be treated in that state.[10]

The state's termination of services, now sanctioned by the federal judiciary, was completely lawless. Department bureaucrats neither attempted to obtain a court order, nor did they resort to any other judicial process whatever.[11] Instead, these authorities took the law into their own hands.

---

[10]The use of excessive force to accomplish a lawful objective constitutes a deprivation cognizable under the due process clause of the fourteenth amendment; thus, police may not use excessive force against criminal suspects they arrest. *See, e.g., Bauer v. Norris,* 713 F.2d 408, 411-13 (8th Cir. 1983); *U.S. v. Harrison,* 671 F.2d 1159, 1162 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 104 (1982) (lack of provocation or need to use force makes any use of force excessive); *Hamilton v. Chaffin,* 506 F.2d 904, 909 (5th Cir. 1975).

[11]The government took measures here which other landowners are forbidden to take. Such self-help tactics have been widely rejected. *See Restatement (Second) Property,* §§ 14.1 to 14.3 (1976). The Uniform Residential Landlord and Tenant Act (ULTRA) expressly prohibits landlords from terminating essential services, and from using other self-help tactics. *See* ULTRA §§ 4.104, 4.107, 4.207, 4.301(c) and 4.302. The modern trend is to restrict landlords to use the judicial process in order to regain possession. Even where helf-help is permitted, landlords are entitled to use only "'such reasonable force as [is] necessary, short of that which threatened death or serious bodily harm, to regain possession.'" *Kaufman v. Abramson,* 363 F.2d 865 (4th Cir. 1966), *quoting Shorter v. Shelton,* 183 Va. 819, 33 S.E. 2d 643, 646 (1945) (affirming exemplary damage award against landlord who terminated electricity; without air-conditioning, increased temperature aggravated elderly stroke victim's condition and could have caused another attack).

They denied food, water, light, heat, refrigeration and medicine to the very people they are statutorily obligated to care for. This sort of unrestrained governmental activity is of course characteristic of totalitarian regimes, where law operates to legitimize such tactics instead of restricting them. All that Petitioners desired was to remain in their home of many years and not be transferred until it was determined that a relocation would not threaten severe physical hardship and injury.[12]

As was found by the Ninth Circuit in *Brede,* Petitioners had a right to receive continued medical treatment and services at Hale Mohalu at least until a pre-termination hearing was held to determine the possible transfer trauma effects that relocation to Leahi Hospital might cause. App. at A-10. Even if the state could have lawfully closed Hale Mohalu without affording a due process hearing, this does not justify terminating life-support services while old and sick people remained within.

III

THE DECISION BELOW HELD THAT FREEDOM FROM TRANSFER TRAUMA CAN NEVER BE A CONSTITUTIONALLY COGNIZABLE INTEREST AS A MATTER OF LAW

The Court of Appeals not only misapplied *O'Bannon,* but decided issues involving highly important due process

---

[12]There exists no state in this country that does not make available a judicially sanctioned eviction proceeding which serves as a buffer between landlord and tenant and a safeguard against abuses of the weak and powerless in the moving process. Whatever the merits of the closings of such public institutions, if it is not done with a rigorous regard for the constitutional rights of those who find themselves in their last years dependent upon state bureaucracies, then the opportunity for physical and psychological abuse of the elderly and disabled, as well as a wanton disregard for their most important legal rights, is certain to result.

concerns and having dangerous implications. Specifically, the decision below sanctioned state-inflicted transfer trauma[13] and approves state use of life-threatening tactics without due process safeguards to affect its will.

This Court in *O'Bannon* did not decide that freedom from state-inflicted transfer trauma, if proven, can be a constitutionally cognizable interest requiring due process protections. Note, *Liberty From Transfer Trauma: A Fundamental Life and Liberty Interest,* 9 Hastings Const. L.Q. 429, 433-36 (Winter 1982). The Court recognized that the transfer of patients may cause some of the patients to suffer "severe emotional and physical hardship . . . ." 447 U.S. at 785 n.16. However, enforcement by the Department of Health, Education and Welfare of their regulations was not a due process deprivation because of the "distinction between *government action* that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizens only indirectly or incidentally . . . ." *id.* at 788 (emphasis added). Moreover, the potential harm caused by transfer trauma was allegedly merely as an adjunct to the patients' main allegation of an entitlement to continued occupancy. 447 U.S. at 777.

Because there were no government actions directed at the patients, any transfer trauma in *O'Bannon* was not inflicted by the state. In contrast, had petitioners ever been allowed to present evidence, this case squarely presents the issue of state-inflicted transfer trauma because

---

[13]"Transfer trauma" is the current term used by the medical profession to describe the higher mortality and morbidity rates which result from the movement of elderly and infirm men and women. The phenomena is not new and in previous years has sometimes been called "relocation stress".

here the state has acted directly upon Petitioners by ordering their transfer to other state facilities.

The holding below, ostensibly based on *O'Bannon,* that state-inflicted physical and psychological harm called transfer trauma, cannot ever constitute a deprivation cognizable under the due process clause directly affects the lives of tens of thousands of elderly individuals receiving health care benefits in government-operated facilities. These senior citizens are entitled to some measure of protection from state practices aimed directly at them and which pose an immediate threat to their lives and well being. The decision below stands for the proposition that the state may treat individuals in its care in any way it sees fit, regardless of the adverse, life-threatening effects of such treatment. As a result, the frail and infirm,[14] at least within the jurisdiction of the Ninth Circuit, are now at the mercy of a bureaucracy's unfettered discretion to make decisions which literally threaten their lives. That was clearly not this Court's intent when it decided *O'Bannon.*

CONCLUSION

The court below has added another sad chapter to Hawaii's long history of inhumane treatment of persons

---

[14]As a result of taxpayer revolts and withdrawal of federal funding in recent years, as well as an increased emphasis on community health care, an unprecedented number of publicly-run institutions have been forced to shut down. Hundreds more of such institutions will be closing their doors in the next several years. The decision below has critical implications for all of the occupants of such institutions, as well as for our society at large. The opinion of the Ninth Circuit would allow such government-run facilities to be abruptly shut down by self-help and with a callous disregard for the lives, as well as the interests, of those who live there. The Constitution requires more.

affected by Hansen's Disease. Petitioners have been deprived of their home and community of over thirty years, even though both the federal government and the state had previously specifically acknowledged the special legal obligation to them.

Petitioners' compulsory segregation began in Biblical times (*see* Leviticus 8:4-5), and most of the petitioners were forcibly taken from their mothers and fathers when they were small children.

Petitioners have undergone a lifelong struggle against physical disability, psychological trauma and social stigma. Indeed, there is probably no other group in the history of mankind that has been for so long forcibly ostracized for no fault of their own. The word "leper" has become synonymous with the pathetic and helpless outcast. This dwindling group, with a history of purposeful unequal treatment, constitutes precisely the type of "discrete and insular" minority which this Court has long said is entitled to heightened judicial protection.

These are the helpless men and women whom a state bureaucracy attacked. The Department withdrew insulin from known diabetics, took nurses away and cut off the electricity needed to store the medicines to keep them alive. The decision below officially sanctions the arrogant attempt of a state bureaucracy entrusted with the care and health of disabled elderly people to deliberately bypass the judicial process. To achieve its end, the state was willing to risk the lives of all of these people, and then literally ripped out their telephone service so that they could not even call for emergency help. Such conduct would be universally condemned under the legal principles of most states. The due process clause guarantees Petitioners a

minimum right to personal security, which includes a right not to be placed in physical jeopardy by the knowing actions of state officials. When such officials place people in physical danger, particularly when they are elderly or otherwise helpless, as Respondent has done here, their conduct must be justified as reasonably relating to legitimate government objectives.

Respondent, when he resorted to self-help, had neither a writ of possession issued by a court of competent jurisdiction, nor the assistance of professional trained law enforcement personnel whose job is to enforce laws against alleged trespassers.

Resolution of conflicting claims is best left to the judicial system, where justice, and not force determine the ultimate rights of the parties. Modern notions of due process leave no room for landlords to be judges of their own causes.

Petitioners urge that this petition be granted so that these issues of extreme importance can be heard and decided by the Court.

DATED: March 5, 1984

Respectfully submitted,

SIDNEY M. WOLINSKY
ANITA P. ARRIOLA
Public Advocates, Inc.

ROBERT M. HARRIS
HARRIS & SMITH
Counsel for Petitioners
Assisted by
DAVID L. AINBENDER
Law Student

(Appendices follow)

APPENDIX I

David Brede, Frank Duarte, Mary Duarte, Paul Harada, Clarence Naia, Leon Nono, Francis Palea, Jubilee Pudhala, Bernard Punikaia, Bernice Pupule, Richard Pupule, Antonion Sagadraca, and Shivuku Sagadraca, Plaintiffs-Appellants,

vs.

Director for the Department of Health for the State of Hawaii, and John Does 1-30, Individually and in their capacity as agents of the Department of Health, State of Hawaii, Defendants-Appellees.

No. 78-3152.

United States Court of Appeals,
Ninth Circuit.

March 3, 1980.
Rehearing Denied April 21, 1980.

Before TRASK and FERGUSON, Circuit Judges, and SOLOMON,* District Judge.

TRASK, Circuit Judge:

For many years, the State of Hawaii has maintained a leprosarium on the Kalaupapa peninsula on the island of Molokai. Beginning in the late 1940's, Hawaii has also maintained a residential facility of just over 11 acres at Hale Mohalu near Pearl City, Oahu. This facility was established in order to enable those leprosy patients who were in need of more sophisticated medical care than was

---

*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

available at Kalaupapa, to live near Honolulu hospitals where expensive equipment and better medical care was available.[1] The Hale Mohalu facility was originally established on federal land. The United States, in return for a commitment by the State of Hawaii to provide care for the state's leprosy sufferers, conveyed the land to the state, subject to a twenty-one year maintenance condition.[2]

---

[1]Leprosy, which is also known as Hansen's disease, is a mildly infectious degenerative disease caused by the micro-organism *Mycobacterium leprae*. The disease produces lesions in the skin, the mucous membranes, and the peripheral nervous system. In its more advanced stages, it affects internal organs and renders its sufferers vulnerable to other diseases such as diabetes and cancer. *See Dorland's Illustrated Medical Dictionary* 849 (25th ed. 1974). Leprosy is endemic to subtropical climates such as that of Hawaii. In 1952, there were more cases of leprosy in Hawaii than there were in the remainder of the United States. *See* S.Rep. No. 1335, 82d Cong. 2d Sess. *reprinted in* [1952] U.S. Code Cong. & Admin.News, pp. 1630, 1631. [Hereinafter Senate Report].

[2]The United States conveyed the land in fee simple subject to a condition subsequent. The conveyance was by quitclaim deed, which incorporated by reference an Application for Purchase with Discount submitted by Hawaii which application stated:

> This real property will be used by the Territory of Hawaii on a permanent basis for a Hansen's disease hospital facility.

The Quitclaim deed provides in pertinent part:

> 1. That for a period of twenty (20) years from the date of this deed the above described property herein conveyed shall be utilized continuously for public health purposes in accordance with the proposed program and plan as set forth in the application of the said GRANTEE dated June 24, 1955, and for no other purpose.
>
> 3. That one year from the date of this deed and annually thereafter for the aforesaid period of twenty (20) years, unless the Secretary [of Health, Education and Welfare], or his successor in function, otherwise directs, the GRANTEE will file with the Department [of H.E.W.], or its successor in function, reports on the operation and maintenance of the above described property and will furnish, as requested, such other

Hawaii nevertheless failed to maintain the facility over the years, permitting it to deteriorate to some extent. The federal government, however, did not utilize its right to require maintenance. On March 23, 1977, the United States' right of entry expired and Hawaii's title to Hale Mohalu became a fee simple absolute. Shortly thereafter, the state began proceedings to close the facility and move its residential and medical support services to Leahi Hospital in Honolulu.

---

pertinent data evidencing continuous use of the property for the purpose specified in the above identified application.

In the event of a breach of any of the conditions set forth above . . . all right, title and interest in and to the above described property shall, at its option, revert to and become property of the UNITED STATES OF AMERICA, which in addition to all other remedies for such breach, shall have an immediate right of entry thereon, and the said GRANTEE, its successors, or assigns, shall forfeit its right, title, and interest in and to the above described property . . . PROVIDED FURTHER, that in the event the UNITED STATES OF AMERICA fails to exercise its option to re-enter the premises for any such breach of said conditions within twenty-one (21) years from the date of the conveyance, the conditions set forth above together with all right of the UNITED STATES OF AMERICA to re-enter as in this paragraph provided, shall, as of that date, terminate and be extinguished.

The GRANTEE shall at its own sole cost and expense keep and maintain the improvements, including all buildings, structures and equipment, at any time situated upon said property, in good order, condition and repair, free from any waste . . .. Should the GRANTEE, its successors or assigns, fail to repair or replace any improvements which need repair or which have been lost, damaged or destroyed as aforesaid within ninety (90) days after written notice to do so, given to the GRANTEE by the Secretary, or his successor in function, the GRANTOR shall be authorized as agent of the GRANTEE, its successors and assigns, to enter upon the premises and to cause such repairs or replacements to be made on the behalf and at the expense of the GRANTEE.

A number of the facility's residents, in appreciation of the residential nature of Hale Mohalu with its private or semi-private living quarters and easy access to friends and family, chose to remain. Over the last decade, advances in medical science have enabled physicians to treat leprosy patients through outpatient services. As a result, the inpatient residents remaining at Hale Mohalu were among the more elderly, afflicted, and crippled of the leprosy population.

On January 26, 1978, the Hale Mohalu facility was officially closed. In recognition of the continued residence of those patients who had decided to remain, the state provided water, electric power, telephone service, food, medical care, and supplies until September 1, 1978, when all these services were terminated. On September 5, a number of those patients still at Hale Mohalu filed the instant suit and a temporary restraining order was entered compelling the state to restore all services. On September 21, 1978, a federal district court denied appellant's motion for a preliminary injunction and dismissed their complaint for lack of standing and for failure to state a claim upon which relief may be granted.

On appeal, appellants raise a number of issues, most of which are without substantial merit. Appellants, however, do raise the possibility that they have a property interest in the form of a legitimate entitlement to continued medical care and residential facilities at the Hale Mohalu leprosarium, which interest may not be deprived without due process. We find the record inadequate to determine whether such an entitlement exists. If it does, certain due process protections, such as a pre-termination hearing, may

be required. Consequently, we remand for further proceedings.

The quoted portions of the deed evidence not only the obligation of the State of Hawaii to maintain the Hale Mohalu site, but further evidences the requirement that the facility be used to provide Hawaii's Hansen's disease patients with a medical care facility. Hawaii's obligation to provide leprosy sufferers with care and treatment was also codified. See Haw.Rev.Stat. § 326-1, note 5, infra.

I

Appellants claim an interest in receiving medical care at the Hale Mohalu facility. This interest may be a property interest protected by the due process clause of the Fifth Amendment if it is more than a "unilateral expectation." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). "[T]here must exist rules or understandings which allow the claimant's expectations to be characterized as 'a legitimate claim of entitlement' to [the benefit]." Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 366 (9th Cir. 1976) (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)). "The source of legitimate claims of entitlement is not the Constitution but rather the acts of the sovereign, state or federal, manifested in legislation, rules, or customs." Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 1978). See also Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).

Appellants' claim is narrow—they assert an entitlement to continued operation of the Hale Mohalu leprosarium.

There are two possible sources for this claim. First, appellants contend that the Hale Mohalu facility qualifies as a Medicaid "intermediate care facility" within the meaning of 42 C.F.R. § 449.10(b)(15) (1977).[3] If the appellants are correct in their assertion, then, under the patient transfer regulations for such facilities, a patient may not be transferred except for "medical reasons or for his welfare or that of other patients, or for nonpayment of his stay."[4] Administrators of intermediate care facilities do not, therefore, have the power to arbitrarily transfer patients for any reason. Under these regulations, patients at such facilities would have a "legitimate entitlement to continued residency at the [facility] of [their] choice." Klein v. Califano, 586 F.2d 250, 258 (3d Cir. 1978).

From the record as it now stands, it is impossible to determine whether Hale Mohalu is, in fact, an intermediate

---

[3]The 1977 regulations were those in effect at the time Hale Mohalu was officially closed and are therefore controlling.

[4]42 C.F.R. § 449.12(a)(1)(ii)(B)(*4*). The pertinent portions of this regulations state:

> (a) The standards for an intermediate care facility (as defined in § 449.10(b)(15) of this part) which are specified by the Secretary pursuant to section 1905(c) and (d) of the Social Security Act and are applicable to all intermediate care facilities are as follows. The facility:
>
> (1) Maintains methods of administrative management which assure that:
>
> (ii) There are written policies and procedures available to staff, residents, their families or legal representatives and the public which:
>
> (B) Ensure that each resident admitted to the facility:
>
> (4) Is transferred or discharged only for medical reasons or for his welfare or that of other patients, or nonpayment of his stay (except as prohibited by the title XIX program).

care facility which is subject to the Medicaid regulations. If it is an intermediate care facility, however, the appellants are entitled to a fact-finding hearing as to the cause of their transfer. See Klein v. Califano, supra, at 258-59.

II

An alternative basis for appellant's claim to an entitlement may derive from Hawaii state law and from the hardship which a transfer may impose on Hale Mohalu patients. The state has statutorily conferred upon leprosy patients an entitlement to treatment at some state leprosarium.[5] Another state statute, however, grants the Hawaii Health Department the unrestricted power to prescribe the place of treatment.[6] Taken together, these statutes appear to

---

[5]Haw.Rev.Stat. § 326–1 provides:

> Establishment of hospitals, etc.; treatment and care of persons affected with leprosy. The department of health, subject to the approval of the governor, shall establish hospitals, settlements and places as it deems necessary for the care and treatment of persons affected with leprosy.
>
> At every such hospital, settlement, and place there shall be exercised every reasonable effort to effect a cure of such persons, and all such persons shall be cared for as well as circumstances will permit, and given such liberties as may be deemed compatible with public safety and in the light of advances in medical science and in accordance with accepted practices elsewhere. Every patient shall be encouraged to take complete treatment so that prompt recovery can be attained and shall be discharged as soon as possible. The treatment shall be compulsory only in those cases where in the opinion of the department, such treatment is necessary to save life or prevent obvious physical suffering, and the department may take such measures as may be necessary to enforce this section.

[6]Haw.Rev.Stat. § 326–3 provides in pertinent part:

> Care in other hospitals, homes, etc. Notwithstanding any of the provisions of this chapter or of any other chapter relating

authorize patient transfers "at will" and therefore the Hale Mohalu residents would enjoy no more than a "unilateral expectation" to continued services at that facility. However, while appellants may have no entitlement to services at Hale Mohalu under Hawaii statutory law, appellant's entitlement to treatment at *some* facility requires a measure of due process protection which may not have been provided in this case.

Under the two-part test of Board of Regents v. Roth, supra, and Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), once an entitlement to threatened services or benefits is established, it then becomes necessary to determine what process is due. The cases have recognized that when the deprivation of some government benefit would operate so as to impose severe hardship upon individuals with an entitlement to that benefit, due process protection in the form of a pretermination hearing may be required. See Goldberg v. Kelly, supra at 260-62, 90 S.Ct. at 1016–17. Here, there is no doubt that the appellants are entitled to care provided by the state. The state may not act so as to reduce these services to the point of imperiling life or imposing other severe hardship without affording the recipients a pretermination hearing. See Mathews v. Eldridge, 424 U.S. 319, 340, 96 S.Ct. 893, 905, 47 L.Ed.2d

---

to this subject matter, the department of health may make arrangements for the care and treatment of any person within the jurisdiction at any hospital, nursing home or convalescent home in the State, either public or private, and bear all expenses of the hospitalization and treatment and any other necessary expenses in the same manner as though the person were confined at any hospital, settlement or place for the care and treatment of persons affected with leprosy established under section 326–1.

18 (1976); Goldberg v. Kelly, supra, 397 U.S. 1016–18 at 260–63; Curlott v. Campbell, 598 F.2d 1175, 1181 (9th Cir. 1979).

In the present case, transferring the Hale Mohalu patients to Leahi Hospital may work such a reduction in benefits. There has been considerable judicial and scientific recognition of the phenomenon known as "transfer trauma." See Bracco v. Lackner, 462 F.Supp. 436, 444–45 (N.D.Cal. 1978); Klein v. Mathews, 430 F.Supp. 1005, 1009–10 (D.N.J. 1977); Burchette v. Dumpson, 387 F.Supp. 812, 819 (E.D. N.Y.1974). Transfer trauma is characterized by physical and emotional deterioration as well as by increased rates or mortality. "The basic principle of the phenomenon is the recognition that the transfer of geriatric patients to any unfamiliar surroundings produces an increased rate of morbidity and mortality." Bracco v. Lackner, supra at 445. The degree to which this phenomenon is applicable to the leprosy patients presently resisting transfer from Hale Mohalu to Leahi Hospital is unclear on this record. To the extent, however, that transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients, relocation may constitute a deprivation cognizable under the due process clause. See Klein v. Mathews, supra at 1010. Cf. Moore v. Johnson, 582 F.2d 1228, 1234 (9th Cir. 1978) (no pretermination hearing required when complaint failed to allege "inhumane and harsh" means of relocating Veterans Administration Hospital patients).

III

Upon establishing their right to due process protection, appellants become entitled to a hearing. It has been sug-

gested, however, that any requirement for a hearing has already been satisfied. The State Health Planning and Development Agency apparently held a hearing before Hale Mohalu was officially closed. The record is too sketchy, however, for this court to determine the extent to which the appellants were represented, adequacy of the notice given, or the adequacy of the hearing itself. It is therefore necessary to remand this case to the district court. On remand, the court should hold hearings designed to ascertain whether the plaintiffs have an entitlement to services at Hale Mohalu arising from either the Medicaid regulations or from the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on the plaintiffs. If such an entitlement exists, then the adequacy of the hearing already held must be ascertained, and any hearings necesary to afford appellants due process should be held. The case is remanded for further proceedings consistent with this opinion.

APPENDIX II

United States Court of Appeals
For the Ninth Circuit

No. 82-4189
CV 78-0336 SPK

Bernard Puniakaia,
Plaintiffs-Appellants,

vs.

Charles G. Clark, Director of the Department of Health,
State of Hawaii,
Defendant-Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Hawaii.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered September 7, 1983.

Bernard Punikaia, David Brede, Frank Duarte, Mary Duarte, Clarence Naia, Francis Palea, Bernice Pupule and Richard Pupule, et al., Plaintiffs-Appellants,

vs.

Charles G. Clark, Director of the Department of Health for the State of Hawaii, individually and in his official capacity, Defendant-Appellee.

No. 82-4189.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 10, 1983.
Decided Sept. 7, 1983.

Appeal from the United States District Court for the District of Hawaii.

Before BROWNING, Chief Judge, and WRIGHT and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Ten leprosy patients (the patients), some of whom live at the Hale Mohalu leprosarium near Honolulu, sued to enjoin the State of Hawaii from closing that facility. The patients claim that a variety of state and federal statutes, regulations, written contracts, and customs, create both a property and liberty interest in the form of a legitimate entitlement to continued medical care and residential facilities at Hale Mohalu. They contend that this entitlement prohibits the state from closing the facility, or alternatively, that it requires the state to provide them with a hearing before closure. The district court found that the

patients possessed no legitimate entitlement and granted summary judgment in favor of the state. We affirm.

I

Because there was a dispute on the factual issue of residency, for purposes of this appeal we assume that the patients are residents of both the state leprosarium at Kalaupapa on the island of Molokai and the residential facilitiy at Hale Mohalu on the island of Oahu. The latter facility was established on federal land in the 1940s to enable Kalaupapa residents who needed sophisticated medical care to live near the Honolulu hospitals where expensive equipment and better medical care were available. In 1956, the federal government conveyed the land on which Hale Mohalu is situated to the State of Hawaii on condition that the state use the land for a leprosarium and that it maintain the Hale Mohalu facility, subject to a twenty-one year right of reentry. Brede v. Director for the Department of Health, 616 F.2d 407, 409 (9th Cir. 1980) (Brede). Although the facility was permitted to deteriorate somewhat, the federal government did not utilize its right to require maintenance. In March 1977, both the federal government's right of entry and the conditions contained in the quit-claim deed expired, and the state's title to Hale Mohalu became absolute. Id. at 409-10.

Due to the dilapidated and unsafe conditions of the buildings at Hale Mohalu, and for economic reasons, the state subsequently sought to close the facility and move the residential and medical support services to Leahi Hospital in Honolulu. On January 26, 1978, Hale Mohalu was closed officially. Those living there were permitted either to transfer to Leahi Hospital or to return to the leprosarium at Kalaupapa.

Although Leahi Hospital apparently is more modern and in better condition than Hale Mohalu, some residents felt uncomfortable moving from the older facility and chose to remain at Hale Mohalu. The state continued to provide these patients with basic services, such as water, electric power, telephone service, food, medical care, and supplies until September 1, 1978, when all services were terminated.

On September 5, 1978, the patients obtained a temporary restraining order from the district court compelling the state to restore all services, and sued to enjoin the state from closing Hale Mohalu. On September 21, 1978, the district court denied the patients' motion for a preliminary injunction and dismissed their complaint for lack of standing and for failure to state a claim upon which relief may be granted. We reversed, stating that the patients had "raise[d] the possibility that they ha[d] a property interest in the form of a legitimate entitlement to continued medical care and residence facilities at the Hale Mohalu leprosarium, which interest may not be deprived without due process." Id. at 410. We specifically identified two possible sources of such an entitlement: (1) Medicaid regulation, 42 C.F.R. § 449-12(a)(1)(ii)(B)(4)(1977), and (2) the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on patients. We found, however, the record inadequate to determine whether an entitlement existed under either of these theories, and whether, therefore, the state was required to provide the patients with a preterminating hearing. We remanded the case to the district court. Id. at 410-12.

On remand, the patients filed an amended complaint alleging additional causes of action. The patients' motion

for a temporary restraining order and preliminary injunction was denied by a second district judge. On appeal, we filed an unpublished order again remanding to the district court to hold an evidentiary hearing and make a new determination on the issuance on a preliminary injunction.

After this remand, the case was heard by a third district court judge. The patients moved for partial summary judgment based on their due process claims. The district judge denied the motion and sua sponte entered summary judgment in favor of the state. We then dismissed the appeal of the preliminary injunction as moot. We now decide the patients' appeal of the district court's denial of a permanent injunction.

II

As we stated in Brede, to establish a property interest in receiving medical care at the Hale Mohalu facility, the patients must demonstrate that they possess more than a "unilateral expectation" of continued service. Id. at 410, quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.C. 2701, 2709, 33 L.Ed.2d 548 (1972); see also Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed. 2d 570 (1972). The source of the patients' claim of entitlement must be "the acts of the sovereign, state or federal, manifested in legislation, rules, or customs." Brede, 616 F.2d at 410, quoting Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 1978).

The patients' primary claim is that a series of Hawaii statutes pertaining to the treatment of leprosy patients confers the necessary entitlement to treatment a Hale Mohalu whether or not a hearing is granted. We have

already dealt with this issue in Brede. We concluded that although "[t]he state ha[d] statutorily conferred upon leprosy patients an entitlement to treatment at some state leprosarium . . . [t]aken together, these statutes appear to authorize patient transfers 'at will' and therefore the Hale Mohalu residents would enjoy no more than a 'unilateral expectation' to continued services at that facility." 616 F.2d at 411 (footnote omitted). The patients argue that our use of the word "appear" indicates that we did not decide this question definitively; moreover, they argue, they are now citing statutory provisions that were not cited to the court in Brede. They are wrong. Taken in context, we indicated that the statutory scheme was not crystal clear but we held what the statutes appeared to us to mean. Our phraseology does not diminish the finality of our holding. We need not reexamine our holding but even if we did so, we would not depart from Brede.

Although the question whether patients possess a property or liberty interest is governed by federal constitutional law, the preliminary question whether a state statutory scheme substantively limits the state's discretion or permits it to act "at will" is one of state law. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9-11, 98 S.Ct. 1554, 1560-1561, 56 L.Ed.2d 30 (1978). The statutes and regulations cited by the patients ensure that leprosy patients will receive treatment at some state leprosarium, Hawaii Rev. Stat. § 326-1 (1976 & Supp. 1982), that patients at Hale Mohalu will receive treatment equal to that received by patients at Kalaupapa, id. § 326-2, that patients at Kalaupapa will be permitted to transfer to Hale Mohalu and vice versa, id. § 326-11, that the residents of Kalaupapa may remain there for the rest of their lives, id. § 326-40 (Supp.

1982), and that patients will not be transferred from one hospital to another without their consent. Hawaii Public Health Reg. 27-6. The district court found, however, that these various statutory provisions were superseded by Hawaii Rev. Stat. § 326-3 (1976 & Supp.1982), which states that "[n]otwithstanding any of the provisions of . . . chapter [326] or of any other chapter relating to [the treatment of leprosy patients]," the Department of Health is authorized to make arrangements for the care and treatment of leprosy patients.

Based on his reading of the statutes and analysis of their legislative history, the district judge concluded that the state had complete discretion to close Hale Mohalu and transfer its patients to alternative facilities. Thus, he reached the same conclusion as we reached in Brede. Two other Hawaii district court judges and an Hawaii State Circuit judge also have reached the same conclusion.[1] The interpretation of Hawaiian law by these Hawaiian judges is not clearly wrong. Jablonski v. United States, 712 F.2d 391 at 397 (9th Cir.1983). The patients have failed to establish an entitlement to continued treatment at Hale Mohalu based on the Hawaii statutes.

III

We turn next to the two possible sources of entitlement specifically mentioned in Brede. 616 F.2d at 410-12. First,

[1]The patients brought suit in the Hawaii state court on January 20, 1978, six days before the closing of Hale Mohalu, seeking a temporary restraining order prohibiting the transfer of patients to Leahi Hospital. The state circuit judge denied the patients' motion for a preliminary injunction, stating that, "Section 326–3, Hawaii Revised Statutes, overrides other laws (including rules and regulations) and authorizes the Department of Health to make arrangements at Leahi Hospital for the care and treatment of any person within the state affected with leprosy."

we concluded in Brede that the patients' "entitlement to treatment at some facility requires a measure of due process protection which may not have been provided in this case." Id. at 411 (emphasis in original). We stated that where patients are entitled to care provided by the state, "[t]he state may not act so as to reduce these services to the point of imperiling life or imposing other severe hardship without affording the recipients a pretermination hearings." Id. at 412. We concluded that such "severe hardship" would exist if the patients could demonstrate that the closing of the Hale Mohalu facility and the proposed transfer would cause "transfer trauma." We remanded the case to the district court because the record was unclear as to the extent to which the leprosy patients resisting transfer to the Leahi Hospital would suffer transfer trauma. Id.

The state argues that the district judge found on remand that the patients at Hale Mohalu would not suffer transfer trauma by moving to Leahi Hospital or back to Kalaupapa. The state admits, however, and the record reveals that the transfer trauma issue was disputed before the district court. Thus, it cannot be the basis for affirming the district court's grant of summary judgment. State ex rel. Edwards v. Heimann, 633 F.2d 886, 888 (9th Cir. 1980); Fed.R.Civ.P. 56(c). The question is whether we can uphold the judgment when we specifically instructed the district court to make a factual finding as to the transfer trauma phenomenon, see *Brede,* 616 F.2d at 410, 412, and the district court did not do so.

Since Brede, the Supreme Court decided O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980) (*O'Bannon*). There, the Supreme

Court held that nursing home patients' interest in receiving care at a particular facility was insufficient to entitle them to a hearing prior to decertification of that facility by either the federal or state government. The Court recognized that decertification would result indirectly in the transfer of the nursing home's patients. 'It also assumed "for purposes of [the] decision that there is a risk that some residents may encounter severe emotional and physical hardship as a result of a transfer." Id. at 784 n. 16, 100 S.Ct. at 2475 n. 16. Nevertheless, the Court distinguished governmental action which results indirectly in transfers of patients from direct transfers of particular patients or reductions in their benefits. The Court stated:

> Although decertification will inevitably necessitate the transfer of all those patients who remain dependent on Medicaid benefits, it is not the same for purposes of due process analysis as a decision to transfer a particular patient or to deny him financial benefits, based on his individual needs or financial situation.

Id. at 786, 100 S.Ct. at 2475. The Court reasoned that in decertifying a facility the government confers an indirect benefit by ensuring safer facilities for all nursing home residents. Such governmental enforcement action may have an indirect adverse impact on residents of the affected facility, but such impact does not amount to a deprivation of any interest in life, liberty, or property. Id. at 786-88, 100 S.Ct. at 2475-76.

O'Bannon is not direct authority because it involved the decertification of a private facility by the government, not a state's closing of its own facility. Nevertheless, we find that O'Bannon controls the disposition of this case. The

state's decision to close the hospital for safety and economic reasons is closely analogous to the government's decertification of a private hospital for failure to maintain minimum health and safety standards. Due process does not require us to impede the state's ability to provide safe facilities and to make economically sound decisions which will allow it to provide the best treatment for the greatest number of patients. Moreover, since the state has continued to provide for leprosy patients by permitting them to transfer to the modern and well equipped Leahi Hospital, or return to Kalaupapa where they are currently registered, the state has not reduced the patients' benefits. Thus, under the reasoning of O'Bannon, the patients do not have an entitlement to services at Hale Mohalu.

The patients attempt to distinguish their case from O'Bannon, citing Yaretsky v. Blum, 629 F.2d 817 (2d Cir. 1980), rev'd on other grounds, ... U.S. ....., 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (Yaretsky). The Second Circuit there held that Medicaid patients' interest in avoiding the effects of transfer from trauma is a constitutionally protected liberty interest where such trauma results from the transfer of a patient from a lower to a higher level of care within existing Medicaid nursing homes. Id. at 821. Yaretsky, however, involved direct transfers of particular patients between existing facilities, not indirect transfers resulting from a decision to decertify or close a facility. Id. at 819. Thus, even assuming the soundness of the Second Circuit's reasoning, the case is not applicable.

Turning to the second possible source of entitlement explicitly mentioned in Brede, we stated that if Hale Mohalu qualified as a Medicaid "intermediate care facility" the

leprosy patients would have a "legitimate entitlement to continued residency at the [facility] of [their] choice." Brede, 616 F.2d at 410-11, quoting Klein v. Califano, 586 F.2d 250, 258 (3d Cir. 1978). This conclusion was based on our interpretation of 42 C.F.R. § 449.12(a)(1)(ii)(B)(4) (1977), which limits the reason for which a patient in a Medicaid "intermediate care facility" may be transferred. See Brede, 616 F.2d at 411 n. 4. The district judge on remand concluded that these regulations would not apply because Hale Mohalu was not an "intermediate care facility," but a "skilled nursing facility."

We need not discuss this asserted difference between types of facilities because we are foreclosed following our own suggestion in Brede due to the Supreme Court's decision in O'Bannon. In O'Bannon, the Court held that 42 C.F.R. § 405.1121(k)(4), which applied to skilled nursing facilities and which is identical to 42 C.F.R. § 449.12(a)(1)(ii)(B)(4) in all relevant respects, does not give rise to an entitlement to continued care at a particular facility. 447 U.S. at 780 & n. 9, 785-88, 100 S.Ct. at 2473 & n. 9, 3475-76. Although the regulations limit the ability of Medicaid facilities to transfer patients, such limits are not applicable to transfers indirectly resulting from decertification of a facility. Id. at 786-88, 100 S.Ct. at 2475-76. The same reasoning applies to the closing of a facility.

Thus, the patients failed on remand to establish an entitlement under either of the two possible bases we set out in Brede.

IV

The patients next suggest a variety of other possible sources for an entitlement to continued care at Hale

Mohalu. The state argues that we are foreclosed by Brede from considering any of these further arguments. It interprets our language in Brede that "appellants raise a number of issues, most of which are without substantial merit," 616 F.2d at 410, as a rejection of any arguments other than the two we have just considered. The patients argue that this passage refers to other claims made to the court in Brede which were abandoned following our decision in that case. Since we did not make clear which claims were "without substantial merit," we will consider the patients' remaining entitlement claims presented in this appeal.

The patients first contend that the government may not terminate utilities and other essential services without first granting residents a notice and a hearing, citing Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). But in that case, the Supreme Court based its determination of an entitlement to continued utility service on state law which prohibited the utility company from terminating services "except for good and sufficient cause." Id. at 11, 98 S.Ct. at 1561. The patients cite no Hawaii statute similarly limiting the Board of Health's power to terminate utility services.

The patients argue, however, that even without an entitlement based on state law, Brede forbids the state from creating a life-threatening situation by cutting off utilities. They rely upon our statement that given the patients' right to at least some care provided by the state, the state could not "act so as to reduce . . . services to the point of imperiling life or imposing other severe hardship without affording the recipients to pretermination hearing." 616 F.2d at 412.

This language, however, refers to the transfer trauma phenomenon, not to whether a hearing is required before a government may close one of its own facilities. Unlike the injuries resulting from transfer trauma, any life-threatening danger resulting from the state's termination of utility services was self-inflicted because the patients voluntarily remained after the facility was closed. If we were to accept the patients' analysis, an occupant of a government facility could remain, as a trespasser, despite the government's attempt to close the facility, and obtain a pretermination hearing on the theory that a termination of essential utilities would pose a life-threatening danger. We reject such an unprecedented interpretation of the due process clause. It was sufficient in this case that the state gave the patients notice before closing the facility and provided alternative facilities for them.

The patients cite Mathews v. Eldridge, 424 U.S. 319, 340, 96 S.Ct. 893, 905, 47 L.Ed.2d 18 (1976), and Goldberg v. Kelly, 397 U.S. 254, 260-63, 90 S.Ct. 1011, 1016-18, 25 L.Ed.2d 287 (1970), as authority for their claim. These cases state only that once a plaintiff has established a legitimate entitlement to a particular benefit, the degree of potential deprivation resulting from a particular decision is a factor which may be considered in determining whether he receives a hearing before or after termination of his benefits. Mathews v. Eldridge, 424 U.S. at 340, 96 S.Ct. at 905. Such cases are inapplicable because the patients have not demonstrated an entitlement to continued care at Hale Mohalu.

We also reject the patients' claim to an entitlement as a utility user based on Kaufman v. Abramson, 363 F.2d 865 (4th Cir. 1966). The plaintiff's suit in that case was for damages under state law; the court did not find any entitlement which would require a pretermination hearing. We express no opinion as to whether the patients may have a cause of action for damages under state law for the state's termination of utility services on September 1, 1978.

The patients next claim a property interest under various Hawaii landlord/tenant laws, see Hawaii Rev.Stat. ch. 666 (1976 & Supp.1982), and public housing laws, see id. §§ 360-2; 360-3. The district judge held that the patients were not "tenants" in a contractual sense under Hawaii law, and that Hale Mohalu could not be characterized as public housing; therefore, he held that the cited statutes were inapplicable. These interpretations of state law are not clearly wrong. The patients also cite cases from other circuits for the proposition that even absent statutory provisions, residents of public housing must be afforded a hearing prior to eviction. See Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S.Ct. 1228, 28 L.Ed.2d 539 (1971); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed.2d 91 (1970). Again, these cases are not relevant because the patients are not public housing tenants.

The patients next contend that the state's provision of continuous care at Hale Mohalu for thirty years constitutes a "custom" or "regularity of performance" creating more than a unilateral expectation in continued residency at Hale Mohalu. Custom may give rise to a legitimate entitlement.

Brede, 616 F.2d at 410; Moore v. Johnson, 582 F.2d at 1233. Nevertheless, the state's continuous operation of Hale Mohalu over several years cannot be characterized as a "custom" which generates a property interest. Otherwise, the government could never close an institution which it has maintained for a long time without granting a pretermination hearing for the individual residents of that institution. Such restriction on governmental action is not required by the due process clause. See Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981) ("A constitutional entitlement cannot 'be created—as if by estoppel—merely because a wholly and expressly discretionary state privilege has been granted generously in the past.' ", quoting Leis v. Flynt, 439 U.S. 438, 444 n. 5, 99 S.Ct. 698, 701 n. 5, 58 L.Ed.2d 717 (1979) (per curiam); see also O'Bannon, 447 U.S. at 785 n. 17, 100 S.Ct. at 2475 n. 17 (dicta).

Although they have been unable to establish an entitlement under any of the individual theories, the patients claim, without citing any authority, that the combination of state statutes, custom, contractual obligations, and state regulations, taken together, give rise to a property interest protectible under the fourteenth amendment. Such a theory was presented to and rejected by the Supreme Court in O'Bannon, 447 U.S. at 781 n. 12, 785, 100 S.Ct. at 2473 n. 12, 2475.

Turning from state to federal law, the patients claim an entitlement under 42 U.S.C. § 247e which specifies that the Public Health Service must receive into a hospital "suitable for his accommodation" any person afflicted with leprosy.

As the district judge correctly observed, however, this statute does not limit public health administrators' discretion to determine in which "suitable" facility a particular leprosy patient will be placed. Although section 247e may give rise to a private suit by a patient who claims that a particular facility is not a "suitable accommodation," it does not confer an entitlement to services at a particular facility.

The patients argue finally that they are entitled to continued residency at Hale Mohalu, whether or not a hearing is granted, as third-party beneficiaries of the quitclaim deed executed by the federal government to the State of Hawaii. The patients contend that the contract required the state to maintain a "permanent" leprosarium, that the provision has been violated by the state, and that their rights as third-party beneficiaries did not expire with the federal government's right of entry. Even assuming that the patients qualify as third-party beneficiaries, their argument fails. Although the deed requires that the state use the property for a leprosarium "on a permanent basis," and that the state maintain the buildings at Hale Mohalu, it also explicitly states that the conditions set forth in the deed, along with the right to re-enter, shall terminate and be extinguished twenty-one years following the date of the deed. Thus, the conditions terminated on March 23, 1977. Brede, 616 F.2d at 409 n. 2. The rights of a third-party beneficiary are limited by the contract between the promisor and the promisee. 4 A. Corbin, Contracts §§ 810, 818 (1951); 2 S. Williston, Contracts § 364A (3d ed. 1959). The parties intended the conditions and, hence, any rights to enforce those conditions, to expire in twenty-one years;

third-party beneficiaries cannot exercise rights that the parties did not intend them to have.

In conclusion, because the patients have not demonstrated a legitimate entitlement to residence and continued services at Hale Mohalu, the due process clause does not require that they be granted a hearing before the state may close that facility. We therefore need not decide whether the patients were afforded sufficient notice and hearings to satisfy the fourteenth amendment.

AFFIRMED.

APPENDIX III

United States Court of Appeals
For the Ninth Circuit

No. 82-4189

D.C. No.
CV-78-0336 SPK

Bernard Punikaia, David Brede, Frank Duarte, Mary Duarte, Clarence Naia, Francis Palea, Bernice Pupule and Richard Pupule, et al.,

Plaintiffs-Appellants,

-vs-

Charles G. Clark, Director of the Department of Health for the State of Hawaii, individually and in his official capacity,

Defendant-Appellee.

[Filed Dec. 6, 1983]

ORDER

Appeal from the United States District Court for the District of Hawaii

Before: BROWNING, Chief Judge, and WRIGHT and WALLACE, Circuit Judges

The panel, as constituted above, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX IV

United States Court of Appeals
For the Ninth Circuit

No. 80-4433
D.C. No. CV-78-03

Bernard Punikaia, David Brede, Frank Duarte, Mary Duarte, Clarence Naia, Francis Palea, Bernice Pupule and Richard Pupule, et al.,

Plaintiffs-Appellants,

v.

George A. L. Yuen, Director of the Department of Health for the State of Hawaii, individually and in his official capacity,

Defendant-Appellee.

[Filed Nov. 27, 1981]

Appeal from the United States District Court
for the District of Hawaii
The Honorable Samuel P. King, Presiding
Argued and Submitted November 10, 1981

ORDER

Before: BAZELON,* HUG and BOOCHEVER, Circuit Judges.

This appeal of an order denying a preliminary injunction reaches us one year and four months after the order was issued. It is apparent that the conditions upon which the request for relief is based may have changed substantially

*The Honorable David L. Bazelon, Senior United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

since that time. In addition, our ability to determine whether the denial of injunctive relief was an abuse of discretion is severely hampered by the State's failure to provide an evidentiary basis for its claims and by the lack of findings of fact and conclusions of law by the district court. We are therefore compelled to remand the case for reconsideration of the plaintiffs' motion in a manner consistent with the terms of this order.

I

The order of the district court was issued in response to the plaintiffs' objections to the magistrate's report. Although the order agrees with the magistrate's recommendation that relief be denied, it does not adopt the findings or conclusions of the magistrate's report. We therefore need not consider here the factual findings and conclusion reached by the magistrate.

It is apparent from the order of the district judge that he believed that the matter should be heard on the merits as soon as possible and anticipated that it would be heard in the near future. This may well have formed part of the reason for his denial of the preliminary injunction, because he believed the granting of the injunction would require extensive remodeling of the facilities, which he was reluctant to order until the merits of the matter had been determined. If there were evidentiary support for the view that plaintiffs seek a mandatory injunction requiring substantial alteration of the status quo, this approach would be within the court's discretion. Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979). However, the relief expressly sought by the plaintiffs is much more limited than that anticipated by the district court. They seek only

restoration of minimal services including water, electricity, telephone, the services of one nurse, medical supplies and limited janitorial services. They characterize the relief sought as an injunction that prohibits the termination of vital services and thus maintains the status quo as it existed prior to the state action. Whether the judge was justified in rejecting this view cannot be determined from this record. It is apparent that some of the plaintiffs continue to live at Hale Mohalu with whatever hazards to health and safety exist. It is doubtful that these hazards are ameliorated by the termination of basic services. Our review requires an explicit characterization of the relief and identification of the evidence supporting it.

The plaintiffs argue strenuously that the wrong legal standard was applied by the district court. Unquestionable use of an improper standard would be an abuse of discretion Al-Kim, Inc. v. United States, 650 F.2d 944, 948 (9th Cir. 1979); Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980). The correct standard for granting preliminary injunctive relief has been clearly and repeatedly stated by this court. The plaintiff's burden is satisfied with a demonstration of either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in the plaintiff's favor. White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1285 (9th Cir. 1981); Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975).

We have no indication as to the standard the district court applied. Even if we were convinced, however, that

a legal error had been made, we would be unable to correct that error by ordering that the injunction issue. The standard mandates flexibility in dealing with pertinent facts and applicable law. It relies upon the trial judge to evaluate four separate evidentiary factors and their interrelationships. These factors include: (1) likelihood of success on the merits, (2) possibility of irreparable injury to plaintiff, (3) comparable hardship to defendant, and (4) effect on public interest. Los Angeles Coliseum, 634 F.2d at 1200.

In an earlier opinion, this court analyzed one factor: the likelihood of success on the merits. Brede v. Director for Department of Health, etc., 616 F.2d 407 (9th Cir. 1980). That opinion indicated that the plaintiffs' claims do have some merit, and we expressly reject the magistrate's conclusion to the contrary. The plaintiffs' amendment of their complaint, filed after our opinion in Brede was issued, adds other substantive claims to those considered in Brede and may thus enhance the chances of the plaintiffs' success. However, we cannot view these legal claims in isolation from the other requirements for injunctive relief. Under our standard, the plaintiffs' burden on the merits is reduced in proportion to the magnitude of their injury. The minimum burden imposed on the plaintiffs is a showing of a "fair chance of success on the merits" or that the claim poses questions "serious enough to require litigation." Benda v. Grand Lodge of Internation Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). Our holding in Brede that these plaintiffs had stated a claim for relief so that dismissal was error, means that at least

the minimal showing has been satisfied. Whether that minimum is sufficient in this case can only be determined in relation to the remaining factors, with special emphasis on the injury to be suffered by the plaintiffs if relief is denied. On the present record, we cannot evaluate any balance drawn by the trial judge in considering these factors. Furthermore, the lapse of time requires consideration of the factors under the present circumstances.

II

Based on the foregoing considerations, the order of this court is as follows:

1. The district court shall hold an evidentiary hearing to determine the following questions, among others it may consider important:

a. Which of the named plaintiffs are now living at Hale Mohalu? Are they full-time or part-time residents? Were all of those persons who are now at Hale Mohalu there at the time the State closed the facility?

b. If basic services were restored at Hale Mohalu, would other members of the plaintiff class return to the facility? If so, how many would return?

c. What would be the cost to the State of reinstating and providing water and utility service, food delivery, telephone services, medical supplies and nursing and janitorial services? How do those costs compare to the cost of providing care for the plaintiffs if they were at Leahi Hospital?

d. Are the buildings that constitute the living facilities at Hale Mohalu an imminent hazard to life and health? If so, what would be the cost of making the

facility reasonably safe for temporary use pending a final decision in this case?

e. What is the nature of the facility at Leahi Hospital? What type of living accommodations are provided and what resrtictions are imposed upon the occupants?

f. Are the plaintiffs who have already moved to Leahi Hospital suffering disadvantanges that they would not have suffered at Hale Mohalu?

g. What is the source and nature of the food, medical and utility services presently available to the plaintiffs at Hale Mohalu? To what degree do these provisions adequately serve the plaintiffs' basic needs?

h. At oral argument before this court the parties referred to a residence facility constructed adjacent to Leahi Hospital subsequent to issuance of the district court order. (The facility was variously referred to as a "cabin" or a "home-like facility.") How does the cost expended by the State to construct this facility compare to the cost of providing the requested basic services at Hale Mohalu? How do those construction costs compare to projected costs for necessary restoration or remodeling at Hale Mohalu, if any?

2. The district court shall make specific and detailed findings of fact as to these questions. Based on those findings, it shall make a new determination on the issuance of a preliminary injunction.

3. The findings of fact and the determination to injunctive relief shall be returned to court within forty-five days from the date of this order.

APPENDIX V

CHAPTER 326

LEPROSY

§ 326-1 Establishment of hospitals, etc; treatment and care of persons affected with leprosy. The department of health, subject to the approval of the governor, shall establish hospitals, settlements, and places as it deems necessary for the care and treatment of persons affected with leprosy.

At every such hospital, settlement, and place there shall be exercised every reasonable effort to effect a cure of such persons, and all such persons shall be cared for as well as circumstances will permit, and given such liberties as may be deemed compatible with public safety and in the light of advances in medical science and in accordance with accepted practices elsewhere. Every patient shall be encouraged to take complete treatment so that prompt recovery can be attained and shall be discharged as soon as possible. The treatment shall be compulsory only in those cases where, in the opinion of the department, such treatment is necessary to save life or prevent obvious physical suffering, and the department may take such measures as may be necessary to enforce this section. [L 1909, c 81, § 1; RL 1925, § 1183; am L 1931, c 139, § 5; am imp L 1933, c 118, § 2; RL 1935, § 1140; RL 1945, §2401; am L 1949, c 53, § 1; am L 1951, c 157, § 1; L 1953, JR 41, § 5; RL 1955, § 50-1; am L Sp 1959 2d, c 1, § 19; HRS § 326-1; am L 1969, c 152, § 2]

§ 326-3 Equal treatment of patients. Every leprosy patient at Hale Mohalu and Kalaupapa shall be accorded as nearly equal care and privileges as is practicable under the different operating conditions of the two institutions. [L

1953, JR 41, § 7; RL 1955, § 50-2; HRS § 326-2; am L 1969, c 152, § 1]

§ 326-3 Care in other hospitals and homes, etc. Notwithstanding any of the provisions of this chapter or of any other chapter relating to this subject matter, the department of health may make arrangements for the care and treatment of any person within the jurisdiction at any hospital, nursing home, or convalescent home in the State, either public or private, and bear all expenses of the hospitalization and treatment and any other necessary expenses in the same manner as though the person were confined at any hospital, settlement, or place for the care and treatment of persons affected with leprosy established under section 326-1. Any moneys at any time appropriated for the care of patients or maintenance of the hospital, settlement, or place established under section 326-1 may be used by the department to pay any hospital, nursing home, or convalescent home with which the department has made such arrangements. When such arrangements have been made the other provisions of this chapter relating to the examination, care, treatment, and discharge of patients shall be applicable to the institution and patient involved in the same manner as they apply to the hospital, settlement, or place established under section 326-1. [L 1949, c 392, § 1; am L 1951, c 1951, § 2]

§ 326-4 Officers and employees; sickness and accident; expense. In case any officer or employee of the department of health becomes ill or is injured at the settlement at Kalaupapa and, in the opinion of the physician of the settlement, or in his absence an authorized agent of the department of health, suitable medical, hospital, nursing, or other services or facilities are not available there, the de-

partment will incur and pay the reasonable and necessary expenses of removing and transporting the officer of employee to and from a place within the State where suitable hospital facilities or treatment can be secured. [L 1941, c 108, § 1; RL 1945, § 2405; RL 1955, § 50-6; am L Sp 1959 2d, c 1, § 19; HRS § 326-4; am L 1968, c 63, § 2; am L 1969, c 105, § 1]

§ 326-5 Appropriations, how spent. All moneys at any time appropriated for the upkeep, support, maintenance, and conduct of any hospital, settlement, or receiving station for persons affected with leprosy, shall be expended under the supervision and authority and by the order of the department of health, upon vouchers signed by the director of health. [L 1931, c 139, § 4; am L 1933, c 118, § 1; RL 1935, § 1144; RL 1945, § 2406; am L 1949, c 53, § 3; am imp L 1949, c 109; RL 1955, § 50-7; am L Sp 1959 2d, c 1, § 19; HRS § 326-5; am L 1969, c 152, § 1]

§ 326-6 Treatment and care of pregnant mothers affected with leprosy; disposition of children. Any woman patient at any place maintained for the treatment or care of persons affected with leprosy who becomes pregnant shall be immediately subjected to necessary examination and care as the department of health may prescribe, and within a reasonable time of the possible delivery of child, the mother shall be placed under hospital care and attention as may be necessary to assure a healthy birth. Any child so born shall be immediately cared for as will reduce the possibility of contracting leprosy. [L 1929, c 147, § 2; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1146; RL 1945, § 2408; am L 1949, c 53, § 5; RL 1955, § 50-8; am L Sp 1959 2d, c 1, § 19; HRS § 326-6; am L 1969, c 152, § 3]

§§ 326-7 to 10 REPEALED. L 1969, c 152, § 11.

§ 326-11 Voluntary transfer to and from Kalaupapa. Any person undergoing treatment and receiving care for leprosy at Hale Mohalu on [June 30, 1969] may be transferred to Kalaupapa Settlement for care and treatment if he desires. Any person who may undergo treatment and receive care for leprosy at Hale Mohalu after [June 30, 1969] may apply to the director of health for transfer to Kalaupapa Settlement.

Any person undergoing treatment and receiving care for leprosy at Kalaupapa Settlement may be transferred to Hale Mohalu for care and treatment if he desires. A person transferred may be retransferred to Kalaupapa Settlement if he desires. [L 1953, JR 41, § 1; RL 1955, § 50-13; am L Sp 1959 2d, c 1, § 19; HRS § 326-11; am L 1969, c 152, § 4]

§ 326-13 Expenses; rules. The department of health shall bear all expenses of travel and other necessary expenses incurred under sections 326-1 to 326-14; and may prescribe all rules, regulations, and forms and perform all acts necessary and proper for carrying out their provisions. [L 1909, c 81, § 8; RL 1925, § 1190; RL 1935, § 1152; RL 1945, § 2414; RL 1955, § 50-15; am L Sp 1959 2d, c 1, § 19]

§§ 326-14, 15 REPEALED. L 1969, c 152, § 11.

§ 326-16 Rehabilitation of patients on temporary release. All patients on temporary release who can be rehabilitated shall be given the opportunity at the hospital or settlement where they are receiving medical care. Following satisfactory rehabilitation and training, every effort shall be made to assist the patients in securing gainful employment to become readjusted to a normal life in soci-

ety. [L 1953, JR 41, § 4; RL 1955, § 50-18; HRS § 326-16; am L 1969, c 152, § 5]

§§ 326-17 to 19 REPEALED. L 1969, c 152, § 11.

§ 326-20 Permits to treat. The department of health may permit any person to engage in the treatment of persons affected with leprosy or of persons supposed to have leprosy. The permits shall be under such conditions and regulations as the department shall prescribe, and be revocable at the pleasure of the department. [L 1892, c 54, § 1; RL 1925, § 1197; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1160; RL 1945, § 2422; am L 1949, c 53, § 15; RL 1955, § 50-22; am L Sp 1959 2d, c 1, § 19; HRS § 326-20; am L 1969, c 152, § 1]

§ 326-21 Labor of patients by consent. The department of health, with the consent of patients, may require the performance of a reasonable amount of labor or service as may be approved by the attending physician. For service rendered, the compensation of a patient shall be set by the department as a percentage of the minimum wage as established by section 387-2. The department shall establish a patient pay plan for six grades of work. The pay for grade I employees shall be equal to fifty-three per cent of the minimum wage as established by section 387-2. The pay for grade VI employees shall be seventy and one-half per cent of the minimum wage as established by section 387-2. There shall be a spread of three and one-half per cent between each of the grades from one to six. The department of health shall set the pay for any other patient employee not covered under the foregoing six grade pay plan.

Each patient employee of the department shall be entitled to and granted a vacation with pay each calendar year, calculated at the following rate:

For patients working six hours a day, one and one-half days for each month of service;

For patients working five hours a day, one and one-quarter days for each month of service;

For patients working four hours a day, one day for each month of service.

A month of service is defined as eighty or more hours of work which may be accumulated over any period of time to total eighty hours. No more than twelve months of service may be earned and credited in any calendar year, even if the total number of hours worked should exceed nine hundred sixty hours. [PC 1869, c 62, § 5; am L 1929, c 149, pt of § 1; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1945, § 2423; am L 1945, c 159, § 1; am L 1949, c 371, § 1 and c 378, § 1; RL 1955, § 50-23; am L 1959, c 146, § 1; am L Sp 159 2d, c 1, § 19; am L 1962, c 28, §32; HRS § 326-21; am L 1968, c 34, § 2; am L 1974, c 115, § 1]

§ 326-22 Labor by patients; employment of released and discharged patients. All outside labor, including yard work, may be performed by patients at any hospital, settlement, or place for the care and treatment of persons suffering from leprosy, as far as patient labor is available, and all the patient laborers shall be compensated in accordance with the rates established in section 326-21.

When there are vacancies in positions, classified under chapters 76 and 77, which are of such nature that the health of the public or of other nonpatient staff members will not be in danger by their being filled by individuals living with or associating closely with active patients, at any hospital, settlement, or place exclusively for the care and treatment of persons suffering from leprosy, employment preference

shall be given to temporary release patients and discharged patients from any such hospital, settlement, or place; provided that the persons so hired shall be otherwise qualified under chapters 76 and 77.

Discharged patients who have been employed prior to December 30, 1960, under chapters 76 and 77 in accordance with the second paragraph of this section shall be eligible to receive the same rights and privileges as those enjoyed by temporary release patients employed under the second paragraph of this section. [L 1937, c 108, § 1; RL 1945, § 2424; am L 1951, c 157; § 11; am L 1953, c 241, § 1; RL 1955, § 50-24; am L 1957, c 10, § 1; am L Sp 1959 2d, c 1, § 19; am L 1961, c 13, § 1; HRS § 326-22; am L 1969, c 152; § 1; am L 1974, c 115, § 2]

§ 326-23 Pensions for patient employees at hospitals, etc. All patient employees or patient laborers at every hospital, settlement, and place maintained for the treatment and care of persons affected with leprosy shall be entitled, upon retirement after twenty years or more service with the department of health, at the hospital, settlement, or place, to a pension, payable monthly, in an amount which shall be equal to sixty-six and two-thirds per cent of the wage or salary which the patient was receiving at the time of retirement, or to a pension, payable monthly, in an amount which shall be equal to sixty-six and two-thirds per cent of the average wage or salary which the patient employee was receiving during his last twelve months of employment at the hospital, settlement, or place, whichever is higher.

Patient employees may use service with any state department or agency not exceeding five years which has not been

credited under the state retirement system in lieu of service with a hospital, settlement, and place maintained for the treatment and care of persons affected with leprosy to satisfy the requirement of the preceding paragraph; provided that the service shall be authenticated by official records of the department where service was performed. [L 1945, c 229, § 1; am L 1949, c 53, § 16; am L 1951, c 157, § 12; RL 1955, § 50-25; am L 1957, c 57, § 1; am L Sp 1959 2d, c 1, § 19; HRS § 326-23; am L 1970, c 43, § 1]

§ 326-24 Rules and regulations. The director of health may adopt rules and regulations pursuant to chapter 91 as he may consider necessary for the conduct of all matters pertaining to leprosy, the treatment thereof, the care, custody, and control of all persons affected with leprosy, and the full and complete governance of the county of Kalawao, except as limited by this chapter. [L 1870, c 33, pt of § 1; RL 1925, § 1199; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1162; RL 1945, § 2425; am L 1949, c 53, § 17; am L 1951, c 157, § 13; RL 1955, § 50-26; am L 1965, c 96, § 36; HRS § 326-24; am L 1969, c 152, § 6]

§ 326-25 Accounts, reports. The department of health shall keep an accurate and detailed account of all sums of money expended by it. The department shall report to the legislature at its regular sessions, such expenditures in detail, together with such information regarding leprosy as it may deem to be of interest to the public. [PC 1869, c 62, § 7; RL 1925, § 1200; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1163; RL 1945, § 2426; am L 1949, c 53, § 18; RL 1955, § 50-27; am L Sp 1959 2d, c 1, § 19; HRS § 326-25; am L 1969, c 152, § 1]

§ 326-26 Who allowed at settlement. No person, not having leprosy, shall be allowed to visit or remain upon any land, place, or inclosure set apart by the department of health for the isolation and confinement of persons affected with leprosy, without the written permission of the director of health, or some officer authorized thereto by the department, under any circumstances whatever, and any person found upon such land, place, or inclosure without a written permission shall be fined not less than $10 nor more than $100 for such offense; provided that any patient resident of Kalaupapa desiring to remain at the settlement shall be permitted to do so for as long as he may choose, regardless of whether or not he has been successfully treated. [L 1870, c 33, pt of § 1; am L 1903, c 8, § 2; RL 1925, § 1201; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1164; RL 1945, § 2427; am L 1949, c 53, § 19; RL 1955, § 50-28; am L Sp 1959 2d, c 1, § 19; HRS § 326-26; am L 1969, c 152, § 1; am L 1977, c 25, § 3]

§ 326-27 Revolving fund for Kalaupapa store. To enable the department of health to operate and maintain the Kalaupapa store, situated at Kalaupapa, Molokai, $10,000 is appropriated as a special fund to be deposited in the state treasury and to be a continual deposit, subject to the control of the department through its director, to be used from time to time in operating and maintaining the Kalaupapa store. All moneys withdrawn from the fund for such purposes shall be reimbursed or restored thereto, so far as may be, out of any moneys received or collected from the sales made in the Kalaupapa store and shall then be available for further use. [L 1915, c 15, § 1; RL 1925, § 1202; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1165; RL 1945, §2428; RL 1955, § 50-29; am L Sp 1959 2d, c 1, §19]

§ 326-28 Kalaupapa store prices; penalty. It shall be unlawful for the department of health or its agents to sell or offer for sale any merchandise at the Kalaupapa store at prices exceeding the actual cost thereof, free on board steamer or any other means of transportation at Honolulu. Any person violating this section shall be fined $25 and in addition thereto shall, in the discretion of the department, be subject to removal from office. [L 1927, c 245, §§ 1, 2; am imp L 1931, c 139, § 5; am imp L 1933, c 118, § 1; RL 1935, § 1166; RL 1945, § 2429; am L 1949, c 80, § 1 (4); RL 1955, § 50-30; am L Sp 1959 2d, c 1, § 19]

§ 326-29 Fishing laws exemption; Kalaupapa. Notwithstanding any provision of law to the contrary, state laws on fishing shall not be applicable to leprosy patients of Kalaupapa settlement, provided the patients engage in fishing along the shorelines and in waters immediately adjacent to the county of Kalawao.

No fish or other marine products obtained by patients may be sold outside of the county of Kalawao.

The department of health shall adopt rules and regulations to control all fishing and acquisition of marine products by leprosy patients. [L 1957, c 106, §§ 1-3; am L Sp 1959 2d , c 1, § 19; Supp § 50-41; HRS § 326-29; am L 1969, c 152, § 1]

§ 326-30 Making or taking of pictures without permission prohibited. Except for professional purposes, no person, other than members of the staff, shall take photographs of any patient confined at any hospital, settlement, or place for the care and treatment of persons affected with leprosy, without the written permission of the patient. [L 1923, c 78, §§ 1, 2; RL 1925, § 1203; am L 1925, c 98, § 1;

am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1167; RL 1945, § 2430; am L 1949, c 80, § 1 (5); am L 1951, c 157, § 14; RL 1955, § 50-31; HRS § 326-30; am L 1969, c 152, § 7]

§§ 326-31, 32 REPEALED. L 1969, c 152, § 11.

§ 326-33 Damien Memorial Chapel. The Father Damien Memorial Chapel at Kalawao, Molokai, and the premises and graveyard thereof are hereby declared to be a public memorial to Father Damien. [L 1935, c 38, § 1; RL 1945, § 2437; RL 1955, § 50-34]

§ 326-34 County of Kalawao governed by department of health. The county of Kalawao shall be under the jurisdiction and control of the department of health and be governed by the laws, rules, and regulations relating to the department and the care and treatment of persons affected with leprosy, except as otherwise provided by law. [L 1905, c 39, § 2; RL 1925, § 1577; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2928; RL 1945, § 2438; am L 1949, c 53, § 26; am L 1951, c 157, § 15; RL 1955, § 50-35; am L Sp 1959 2d, c 1, § 19; HRS § 326-34; am L 1969, c 152, § 8]

§ 326-35 Sheriff, appointment, removal. There shall be no county officer in the county other than a sheriff, who shall be a resident of and be appointed in the county by the department of health and who shall hold office at the pleasure of the department or until his successor is appointed by the department. [L 1905, c 39, § 3; am L 1911, c 134, § 1; RL 1925, § 1578; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2929; RL 1945, § 2439; am L 1951, c 157, § 16; RL 1955, § 50-36; am L Sp 1959 2d, c 1, § 19]

§ 326-36 Sheriff, salary. The salary of the sheriff shall be fixed and paid by the department of health out of the appropriation allowed by the legislature for the care and treatment of persons affected with leprosy. [L 1905, c 39, § 4; RL 1925, § 1579; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2930; RL 1945, § 2440; am L 1949, c 53, § 27; am L 1951, c 157, § 17; RL 1955, § 50-37; am L Sp 1959 2d, c 1, § 19; HRS § 326-36; am L 1969, c 152, § 9]

§ 326-37 Sheriff, duties. The sheriff of the county of Kalawao shall preserve the public peace and shall arrest and take before the district judge for examination all persons who attempt to commit or who have committed a public offense and prosecute the same to the best of his ability. [L 1905, c 39, § 5; RL 1925, § 1580; RL 1935, § 2931; RL 1945, § 2441; RL 1955, § 50-38; HRS § 326-37; am L 1970, c 188, § 39]

§ 326-38 Sheriff, powers. The sheriff may appoint and dismiss and reappoint as many policemen as may be authorized by the department of health for the county who, for the services rendered as policemen, shall receive pay as the department determines and which pay shall be taken out of and from the appropriation made by the legislature for the care and treatment of persons affected with leprosy. The sheriff shall have other powers and duties within the county of Kalawao and appropriate thereto as are prescribed by law for the chiefs of police or police officers of the several counties respectively. [L 1905, c 39, § 6; RL 1925, § 1581; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2932; RL 1945, § 2442; am L 1949, c 53, § 28, and c 80, § 1 (7); am L 1951, c 157, § 18; RL 1955,

§ 50-39; am L Sp 1959 2d, c 1, § 19; HRS § 326-38; am L 1969, c 152, § 10]

§ 326-39 Penalty. Any person violating this chapter, or any rule or regulation of the department of health relating thereto, shall be deemed guilty of a misdemeanor. Except as herein otherwise provided, the punishment therefor shall be the same as provided by section 321-18. [1951, c 157, § 19; RL 1955, § 59-40; am L Sp 1959 2d, c 1, § 19]

[§ 326-40] Kalaupapa; policy on residency. The legislature finds that Hawaii's leprosy victims have in many ways symbolized the plight of those afflicted with this disease throughout the world. Their sufferings and social deprivations helped eventually to bring the story of the disease and an understanding of its health ravages to people everywhere. Those patients who settled in Kalaupapa remain a living memorial to a long history of tragic separation, readjustment, and endurance.

It is the policy of the State that the patient residents of Kalaupapa shall be accorded adequate health care and other services for the remainder of their lives. Furthermore, it is the policy of the State that any patient resident of Kalaupapa desiring to remain at the settlement shall be permitted to do so for as long as he may choose, regardless of whether or not he has been successfully treated. [L 1977, c 25, § 2]

§ 247e. Receipt, apprehension, detention, treatment, and release of lepers

(a) The Service shall, in accordance with regulations, receive into any hospital of the Service suitable for his

accommodation any person afflicted with leprosy who presents himself for care, detention, or treatment, or who may be apprehended under subsection (b) of this section or section 264 of this title, and any person afflicted with leprosy duly consigned to the care of the Service by the proper health authority of any State. The Surgeon General is authorized, upon the request of any health authority, to send for any person within the jurisdiction of such authority who is afflicted with leprosy and to convey such person to the appropriate hospital for detention and treatment. When the transportation of any such person is undertaken for the protection of the public health the expense of such removal shall be met from funds available for the maintenance of hospitals of the Service. Such funds shall also be available, subject to regulations, for transportation of recovered indigent leper patients to their homes, including subsistence allowance while traveling. When so provided in appropriations available for any fiscal year for the maintenance of hospitals of the Service, the Surgeon General is authorized and directed to make payments to the Board of Health of Hawaii for the care and treatment in its facilities of persons afflicted with leprosy at a per diem rate, determined from time to time by the Surgeon General, which shall, subject to the availability of appropriations, be approximately equal to the per diem operating cost per patient of such facilities, except that such per diem rate shall not be greater than the comparable per diem operating cost per patient at the National Leprosarium, Carville, Louisiana.

(b) The Surgeon General may provide by regulation for the apprehension, detention, treatment, and release of persons being treated by the Service for leprosy.

U.S. Constitution amend. XIV § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

83-1481

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, *et al.*,

Petitioners,

vs.

CHARLES CLARK, Director of the Department of Health for the State of Hawaii, Individually and in his Official Capacity,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TANY S. HONG
Attorney General
State of Hawaii

MICHAEL A. LILLY
First Deputy Attorney General
Counsel of Record

JAMES H. DANNENBERG
Deputy Attorney General
State Capitol, Room 405
Honolulu, Hawaii
Counsel for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether patients who move into an unsafe treatment facility to protest its closure have a constitutional right to a hearing before the state closes the facility where:

a. state law does not confer a substantive right on the residents to remain at the facility;

b. state law does not purport to limit the discretion of the state to close the facility and transfer its residents to a new facility; and

c. The facility's closure does not reduce or terminate the residents' care, but merely requires them to obtain care at a new facility?

2. Wheher a state may terminate utility services at an unsafe treatment facility eight months after its closure without first providing a constitutional due process hearing to patients who voluntarily chose to stay at the closed facility?

3. Whether this court should overrule its long line of cases which hold that a grievous loss (*e.g.*, transfer trauma) alone does not confer an independent right to due process under the Fourteenth Amendment to the United States Constitution?

4. Whether the plethora of hearings provided Petitioners satisfied any putative right they may have had to due process?

LIST OF THE PARTIES AFFECTED

There being no list submitted by Petitioners of the parties affected, Respondent submits that, except for the persons listed in the caption, there are no other parties affected by this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ____

BERNARD PUNIKAIA, *et al.*,

Petitioners,

vs.

CHARLES CLARK, Director of the Department of Health for the State of Hawaii, Individually and in his Official Capacity,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondent, Charles Clark, respectfully prays that a Writ of Certiorari not issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The March 5, 1982 decision of the United States District Court for the District of Hawaii, denying injunctive relief to Petitioners and granting summary judgment to the Respondent, is unreported and reprinted herein as Appendix A.

The March 29, 1982, judgment of the district court is unreported and reprinted herein as Appendix B.

The September 21, 1978, Memorandum and Order of the district court is unreported and reprinted herein as Appendix C. Contrary to Petitioners' erroneous claim that this decision was reversed by *Brede* v. *Director for the Department of Health*, 616 F.2d 407 (9th Cir. 1980) (*see* Petition, at 7), it is clear that *Brede* only remanded Judge Dick Yin Wong's decision "for further proceedings" (*see* Appendix I, at A-10).

STATEMENT OF THE CASE

The issue in this case is whether the United States Constitution prevents state officials from closing a termite-ridden and unsafe leprosy treatment facility and transferring its program to a new facility 12 miles away without first providing due process.

One state court judge, one federal magistrate, three federal district judges, and a panel of the Ninth Circuit have ruled that Petitioners have no constitutional due process right to a hearing and to remain at the facility before the State closed it.

In addition, *Brede* v. *Director for the Department of Health*, (Appendix I, at A-7-8), observed that the Hawaii "statutes appear to authorize patient transfers 'at will' and therefore the Hale Mohalu residents [*i.e.*, Petitioners] would enjoy no more than a 'unilateral expectation' to continued services at that facility."

Nothing in state law substantively fetters the discretion of state health officials from closing unsafe leprosy treatment facilities. Therefore, there is no basis for finding a predicate to invoke the Due Process Clause in this case.

A. INTRODUCTION

The affliction of leprosy evokes deep and obvious sympathies in mankind. Until modern times, the disease was incurable and largely misunderstood. As a result, since time immemorial, it has been the cause of shock and fear. Treatment was limited to exile or worse.

Since the 1940's, however, society's treatment and perception of leprosy changed with the discovery of new medicines. With these medical breakthroughs, the disease could be arrested and patients could, for the first time, live in the community, as over 600 now do in Hawaii. Appendix A, at 3a. Others are offered free life-time room, board, clothing, medical care and transportation at the Kalaupapa settlement on the island of Molokai. *Id.*, at 1a-2a.

Since the inception of this lawsuit, however, the Petitioners have exploited the obviously emotional aspects of leprosy. They have also attempted to characterize the state's actions as being callous and indifferent in regard to their special needs.[1]

Nothing could be further from the truth. Every trial judge who has reviewed and become familiar with the facts of this case has rejected the Petitioner's claims. As Judge Martin Pence observed, after a five-day hearing, "[i]t should appear obvious to anyone who was familiar with the factual background of this case that the plaintiffs' case is entirely without any merit whatsoever. . . ." *Id.*, at 43a.

---

[1] In their opening brief below, for example, petitioners disingenuously compared the State of Hawaii with a South American dictatorship. O.B., at 55.

One Hawaii state circuit judge, one federal magistrate, three federal judges, and a Ninth Circuit panel have so ruled.

The State of Hawaii has also acted with compassion for Petitioners. They "are now receiving more assistance from the people of Hawaii than is given to those suffering, for example, from muscular dystrophy, or cancer, or heart attacks." *Id.*, at 46a. Since 1976, they have also been given the right to live free at Kalaupapa on the island of Molokai for life. *Id.*, at 6a-7a.

The emotional sympathies that leprosy engenders should be not used as a shield to hide the fact that Hawaii has surpassed its statutory and constitutional duties to the Petitioners.

B. STATEMENT OF THE FACTS

A complete statement of the facts of this case is set forth in Judge Pence's decision (Appendix A). In order to place Petitioners' emotional Statement into perspective, the following uncontroverted facts are highlighted.

The Hale Mohalu leprosy treatment "facility was established on federal land [on the island of Oahu] in the 1940's. . . . In 1956, the federal government conveyed the land . . . to the State of Hawaii," conditioned on the obligation to maintain a leprosarium for 21 years. Appendix II, at A-13. In 1977, the State's title to the property "became absolute." *Id.*

On January 26, 1978, the State of Hawaii officially closed the dilapidated leprosy treatment facility, known as Hale Mohalu, at Pearl City, Oahu, and reassigned its program on the grounds of Leahi Hospital at Diamond Head. Appendix A, at 17a.

That day, all permanent residents of Hale Mohalu moved to Leahi. The Petitioners, on the other hand, were permanent residents of Kalaupapa on the Island of Molokai who remained at or moved into Hale Mohalu principally to protest its closure. *Id.*, at 43a-44a.

The facility's closure was neither a hasty one nor an arbitrary one. *Id.*, at 12a. Indeed, in 1969, the Petitioners themselves recommended that the State close Hale Mohalu and reestablish the program in the vicinity of Leahi.[2]

In the years that followed, numerous studies were conducted and no less than "23 hearings" (Appendix A, at 12a.) were held in public "with patients and patients' representatives, and an attorney for those patients" (*id.*, at 13a) regarding the proposed closure.

The reason for the 1978 closure was that the facility had dilapidated to such an unsafe condition that the Petitioners' own structural engineer admitted that "to say this building is structurally safe would be foolhardy." R.T., at 51:23-52:1; and Appendix A, at 14a.

---

[2] In 1969, the Citizens Committee on Hansen's Disease unanimously recommended that Hale Mohalu be closed and the residents transferred to Leahi. *Id.*, at 3a-4a; R. T., at 349:25-350:6. It is undisputed that Bernard Punikaia, representing all of the patients at Kalaupapa (R. T., at 393:8-10), and Anita Una, representing all of the patients at Hale Mohalu, voted for the transfer (R. T., 393:19-20):

"QUESTION [BY MR. LILLY] You agreed with the transfer recommendation of Hale Mohalu to something in proximity to Leahi Hospital?

"ANSWER [BY MR. PUNIKAIA] Yeah.

"QUESTION Did Anita Una agree with that recommendation?

"ANSWER Yes, yes." R. T., at 394:13-17.

Between the January 26, 1978, closure and September 1, 1978, the state made every effort to encourage the patients, who voluntarily chose to remain at or move into the facility, to leave. They were given advance notice that the state would shut off utilities on September 1. That shut-off was not a "pre-dawn raid," as Petitioners continue to describe it. Rather, they had actual advance *notice* that the utilities would be terminated on that date. R.T., at 416:11-24.

The new facility at Leahi was described by one of the Petitioners as "beautiful." R.T., at 193:24-25. It is a two-story, multiroom house on the slopes of Diamond Head above Waikiki. One would have to be a millionaire to own it. Appendix A, at 40a-43a; and R.T., at 640-643.

The State of Hawaii is not unmindful of the plight of those afflicted with the scourge of leprosy. We sympathize with and have empathy and compassion for them. However, the State has fulfilled its moral obligation to the patients. They are free to live at Kalaupapa on Molokai or Leahi on Oahu or return, with no societal or legal restraints, to the community where over 600 other patients are now living relatively normal lives.

Respondent asks this court to recognize, as has every trial court below, "that the plaintiffs' claims were, and are, entirely without merit." Appendix A, at 62a.[3].

---

[3] On September 21, 1983, the remaining patients at Hale Mohalu were evicted and all structures thereon razed. The facility no longer exists and none of the Petitioners now reside there.

ARGUMENT

I

The Decision To Close Hale Mohalu And Reassign Its Program To A New Facility Did Not Implicate A Property Interest Protected By The Due Process Clause.

O'Bannon v. *Town Court Nursing Center*, 447 U.S. 773 (1980) supports the Ninth Circuit's conclusion that Petitioners had, under the Hawaii statutes, no legitimate expectation of continued residency at Hale Mohalu. Thus, under the rule of *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), the Petitioners' abstract desire for continued residency was insufficient to invoke the Due Process Clause.

In *O'Bannon*, this court held that "patients have no interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing" (*id.*, at 784) where:

1. federal laws "do not confer a right to continued residence in the home of one's choice" (*id.*, at 785);

2. federal laws "do not purport to limit the Government's right" to transfer patients (*id.*);

3. "decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility" (*id.*, at 785-786); and

4. the fact that "some residents may encounter severe emotional and physical hardship as a result of a transfer" (*id.*, at 784 n. 16) does not mean that the facility's closure constitutes "a governmental decision to impose that harm" (*id.*, at 789).

In arguing that *O'Bannon* applies only to indirect termination of benefits, Petitioners seriously misconstrue the import of the *O'Bannon* decision.

The Ninth Circuit in *Bumpus* v. *Clark*, 681 F.2d 679, 687 (9th Cir. 1982), *dismissed as moot* (nursing home closed), 702 F.2d 826 (1983), correctly held that the *O'Bannon* reasoning "applies with equal force" to the voluntary (*i.e.*, direct) withdrawal of services by a county-owned nursing home.

The *O'Bannon* reasoning applies because no constitutional distinction can be made between indirect and direct terminations. The legitimacy of Petitioners' expectancy of continued residence at Hale Mohalu is defined, not by the direct or indirect nature of state action, but by the "contours of the right[s] conferred by the statutes and regulations" in Hawaii. *O'Bannon*, 447 U.S. at 786.

Because Hawaii laws confer unlimited discretion on state officials to make transfer decisions for any reason or no reason at all, the Petitioners have "no enforceable expectation of continued benefits" at Hale Mohalu. *O'Bannon*, 447 U.S. at 786.

The indirect/direct analysis in *O'Bannon* was significant because it served to describe the legitimacy of the patients' expectations under the contours of federal law. The more indirect the relationship, the more likely that the citizens' expectation will be but an abstractioon. Conversely, the more direct the relationship, the more likely that the citizens' expectation will be based upon a concrete and legitimate right.

Still, regardless of whether governmental action is defined as either direct or indirect, a citizen is not entitled to due process unless he first has a legitimate right to the benefit the government seeks to withdraw. If, for example, state law had permitted the unfettered withdrawal of utility services in *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), then the direct

government action of terminating utility services would not have triggered due process because the citizens would have had no legitimate entitlement to continued services. Because continued services were defeasible only "for cause" in that case, the Due Process Clause was triggered.

Similarly, the direct government action of transferring an inmate thousands of miles away to another state did not trigger due process in *Olim* v. *Wakinekona*, ____ U.S. ____, 75 L.Ed.2d 813 (1983), because state regulations conferred no more than a unilateral expectation of continued residency in Hawaii prisons. *Accord*, *Meachum* v. *Fano*, 427 U.S. 215 (1976); *Montanye* v. *Haymes*, 427 U.S. 236 (1976); *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); *Connecticut Board of Prisons* v. *Dumschat*, 452 U.S. 458 (1981); *Jago* v. *Van Curen*, 454 U.S. 14 (1981) (*per curiam*); and *Hewitt* v. *Helms*, 74 L.Ed.2d 675 (1983).

Thus, just because *O'Bannon* found that indirect deprivations did not trigger due process, one may not say, *a fortiori*, that direct deprivations do. On the contrary, due process still depends upon a legitimate state-created entitlement and, as will be explored herein, nothing in Hawaii law can be viewed as giving Petitioners more than a unilateral expectancy of continued residency at Hale Mohalu. For that reason, the—albeit direct—governmental action of terminating the Hale Mohalu program did not trigger in Petitioners the right to constitutional due process.

A. State Law Does Not Confer A Substantive Right On Petitioners To Remain At Hale Mohalu And Does Not Purport To Limit The Discretion Of State Officials To Close Hale Mohalu And Transfer Its Program To A New Facility.

Every federal and state court to have considered the question has ruled that Hawaii law does not purport to limit or fetter the discretion of state officials to reassign leprosy treatment facilities in Hawaii.

This is significant, for the interpretation of State laws by federal and state judges who sit in the affected state and "have practiced law there for many years" should be accepted unless palpably incorrect. *Bishop* v. *Wood*, 426 U.S. 341, 344-345 (1976).

Where, under state law, the "decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' [citation omitted], the State has not created a constitutionally protected liberty interest." *Olim* v. *Wakinekona*, 75 L.Ed.2d at 823.

And that has been the conclusion of every state and federal judge sitting in Hawaii regarding the discretion of Respondent in this case:

First, State Circuit Judge Harold Shintaku, in *Punikaia* v. *Yuen*, Civ. No. 53577 (First Circuit, Haw.) concluded that "Section 326-3, Hawaii Revised Statutes, overrides all other laws (including rules and regulations) and authorizes the Department of Health to make arrangements at Leahi Hospital for the care and treatment of any person within the state affected with leprosy." Appendix A, at 53a.

Second, in examining this same issue, United States District Judge Dick Yin Wong held on September 21, 1978, that:

> Section 326-3 therefore confers unlimited discretion on the Department of Health to make arrangements for the "care and treatment" of persons afflicted with leprosy, "[n]otwithstanding' § 326-11." Appendix C, at 68a.
>
> * * *
>
> The pertinent Hawaii laws do not contain standards governing the Department of Health's exercise of discretion in the care and treatment of persons afflicted with leprosy. *Id.*

Third, United States District Judge Martin Pence reviewed § 326-3 and determined that "there is nothing to be found in the legislative history which even inferentially inhibits the Department of Health from moving the Hale Mohalu care program to any other site." Appendix A, at 54a.

Finally, the Ninth Circuit deferred to these interpretations which, it concluded, were "not clearly wrong." Appendix II, at A-17.

To the extent that the Petitioners doubt that Respondent's discretion under Hawaii law is truly unfettered, they doubt the ability or authority of the Hawaii state courts and the lower federal courts to construe state law. *See Olim*, 75 L.Ed.2d at 823 n. 10.

B. Hale Mohalu's Closure Did Not Reduce Or Terminate The Petitioners' Care, But Merely Required Them To Obtain Care At A New State-Operated Facility.

The closure of Hale Mohalu did not result in any more of a reduction or termination of benefits than the decertification of the facility in *O'Bannon*. In both cases,

the patients were merely required to obtain benefits at another facility.

Moreover, as the Ninth Circuit observed, any harm occasioned by the "state's termination of utility services was self-inflicted because the patients voluntarily remained [for eight months] after the facility was closed." Appendix II, at A-23.

Because Petitioners did not suffer a reduction or termination of their benefits, they were not entitled to a due process hearing before Hale Mohalu was closed.

C. The Mere Possibility Or Existence Of Transfer Trauma Or Any Other "Grievous Loss" Does Not Alone Confer An Independent Right To Due Process.

This court should not overrule its long line of cases which hold that a grievous loss (*e.g.*, transfer trauma) does not confer an independent right to due process.

It is the nature of the loss rather than its magnitude which determines whether due process is triggered. *Meachum* v. *Fano*, 427 U.S. at 224. Thus in *Jago* v. *Van Curen*, 454 U.S. at 17, this court held that the grant of parole could be withdrawn without due process even though it recognized that "respondent suffered 'grievous loss' . . ."

Similarly, in *O'Bannon*, this court found "unpersuasive" arguments to the effect that "transfer trauma" independently triggered the Due Process Clause:

> Nevertheless, we assume for purposes of this decision that there is a risk that some residents may encounter severe emotional and physical hardship as a result of a transfer. 447 U.S. at 784 n. 16.

"Transfer trauma" is nothing more than a form of "grievous loss." Given the unbroken line of precedent laid down by *Roth*, *Meachum* v. *Fano*, *Jago* v. *Van Curen*,

and numerous other cases, it seems ineluctable that reference to "transfer trauma" is insufficient as an independent predicate for a due process claim.[4]

II

Assuming Petitioners Were Entitled To Due Process, The State Provided Them With All The Process To Which They Were Due.

The touchstone of procedural due process may be characterized as fundamental fairness, and no particular set of procedures is mandated for all situations. We contend that under any reasonable analysis, the Petitioners were provided more than adequate due process.

Judge Pence observed that, before the Hale Mohalu facility was closed, Petitioners were given "at least 23 hearings on the subject. . . ." Appendix A, at 12a. He concluded that, if the Petitioners "did have a 'property interest' in remaining . . ., the record indicates that all of the plaintiffs were provided adequate notice, opportunity to be heard, were heard, and were clearly and fully notified of the proposed state action long before and up to the very last day of intended transfer." *Id.*, at 47a-48a.

Moreover, Petitioners stipulated during the hearing below that, before the closure, the State Health Planning and Development Agency held four hearings on the transfer of the Hale Mohalu program. R.T., at 571-573. Petitioners were provided advance notice (*id.*, at 572:25) and were given opportunities to comment on the plan (*id.*, at 572:19-23), including the right to have an attorney repre-

---

[4] Even if transfer trauma could trigger due process, it would not apply to the Petitioners, "all of whom were from Kalaupapa" and thus had, at best, a mere transient interest in Hale Mohalu. Appendix C, at 22a.

sent them at those hearings (*id.*). *See also*, Appendix A, at 48a.

Under any reasonable analysis of the Due Process Clause, Petitioners were provided more than adequate due process.

III

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be DENIED.

DATED: Honolulu, Hawaii, May ____, 1984.

Respectfully submitted,

MICHAEL A. LILLY
First Deputy Attorney General
Counsel of Record

JAMES H. DANNENBERG
Deputy Attorney General
State Capitol, Room 405
Honolulu, Hawaii
Counsel for Respondent

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 78-0336
Decision on Remand; Decision on Summary Judgment; Judgment

BERNARD PUNIKAIA, DAVID BREDE, FRANK DUARTE, MARY DUARTE, CLARENCE NAIA, FRANCIS PALEA, BERNICE PUPULE, RICHARD PUPULE, SAM KALIKO, PAUL HARADA, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

vs.

GEORGE A. L. YUEN, Director of the Department of Health for the State of Hawaii, individually and in his official capacity,

Defendant-Appellee.

DECISION ON REMAND; DECISION ON SUMMARY JUDGMENT; JUDGMENT

BACKGROUND FACTS*:

Although the Court of Appeals, in *Brede vs. Director for Dept. of Health, etc.*, 616 F.2d 407 (1980) detailed some of the history of the treatment of "lepers" in Hawaii, its resume' did not attempt to be complete. Leprosy was introduced by immigrant laborers into the Kingdom of Hawaii around the 1850-60's. From time immemorial, leprosy and its control plagued almost every society throughout the world until the discovery, in the late 1940's, of drugs which could arrest the disease and curtail its spread. Until that time, the only method of preventing the spread of the disease was to isolate those infected so

---

* *All* statements of facts made hereafter are to be deemed Findings of Facts by this judge.

that they could not have contact with other members of society. During the Kingdom of Hawaii, just such a place of isolation was instituted on what is now known as Kalaupapa on the Island of Molokai. The Kingdom, the Republic, the Territory, and the State of Hawaii, successively, have provided, without charge, homes, hospitals, food, clothing, and transportation, as well as other community services for those so afflicted.

Not too long after the territorial government was established in 1900, the Territory set up a receiving and care station in Kalihi Valley, Honolulu, for those who were initially afflicted with the disease, as well as for those from Kalaupapa who were transported to Honolulu for such needed medical and other services as were not found at Kalaupapa.

After World War II, in 1949, when some buildings built during the war to house Naval personnel were no longer needed by the Navy, an eleven-acre plot with a cluster of wooden buildings and barracks on it was acquired by the State from the federal government. The Kalihi station was abandoned and all leprosy patients using the same were transferred to a large two-story wooden barracks building on the plot, the "Clinton Building", which became known as Hale Mohalu ("House of Relaxation"). The facility was licensed as a "Skilled Nursing Facility", i.e., as a nursing home, not as a hospital.[1] In 1956, the plot was conveyed to the Territory. The deed provided that the then Territory of Hawaii should provide care thereon for leprosy sufferers for at least 21 years thereafter.[2]

At that time there were over a hundred leprosy patients living in the Hale Mohalu facility. There, nursing and general custodial care for leprosy patients were provided. The facility was also used to house those from Kalaupapa who were in

---

[1] Affidavit of Malcolm T. Tomooka, Exhibit C—Defendant's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment (D.'s M.O.).

[2] The state used some of the other buildings on the lot for other social and welfare clinics and offices.

Honolulu for any reason. Those who were permanently residing at Hale Mohalu were known as "registered Hale Mohalu patients". Those whose permanent homes were in Kalaupapa were "registered Kalaupapa patients".

As indicated above, the new drugs brought about a complete change in the method of treating and caring for those suffering from Hasen's disease. There was no longer any need to keep those suffering from leprosy in isolation. As a result, most of those registered patients of Hale Mohalu were gradually released to return to their siblings and to the community, and the number of "registered Hale Mohalu patients" steadily declined.

In the 1960's, it was recognized by those concerned with the problems of Hansen's disease and its sufferers that the Clinton Building, from the very nature of its design and construction, was not, and would not be, the best place for the type of care and support required for the "old-time" Hansen's disease sufferers. Apparently stimulated by A. A. Smyser, Editor of The Honolulu Star Bulletin, the State Department of Health appointed a Citizen's Committee on Leprosy in 1968 to make a study of the problem of leprosy in Hawaii.[3] Dr. Thomas K. Hitch, Ph.D. in Economics, was Chairman. On the Committee were six medical doctors, among whom was Robert W. Worth, who testified before this court in the present hearing. Also on it was Bernard Punikaia, a "registered Kalaupapa patient", and one of the plaintiffs in this action, who also testified at this hearing. Another leprosy patient, Mrs. Anita Una, was on the Committee. The remainder of the 15-member Committee was composed of individuals from diverse ethnic and occupational

---

[3] In Brede v. Director for the Department of Health, etc., 616 F.2d 407 (9th Cir. 1980), that court assumed that when, on March 23, 1977 "Hawaii's title to Hale Mohalu became a fee simple absolute", "shortly thereafter the State began proceedings to close the facility and moved its residential and medical support services to Leahi Hospital in Honolulu." *Brede, supra*, at p 410. This assumption was incorrect.

groups in the community. In its report, "A New Look At Leprosy In Hawaii",[4] the Committee reviewed the history of leprosy throughout the world as well as in Hawaii, and the incidence of the various types of leprosy in Hawaii. The report also pointed out the changes which had resulted from the development of sulfone drugs which, by 1946, made leprosy curable. The Committee heard "extensive testimony from numerous leprologists and deliberated for a period of five months before making its recommendations."[5] Among the Committee's recommendations was that "facilities for comprehensive treatment of leprosy should be established in close proximity to the University of Hawaii Medical School". At that time, the Medical School was located on the grounds of Leahi Hospital, a hospital complex[6] that had been built by the Territory for tubercular patients before a cure for that disease had been found.

Dr. Robert Worth, as well as Bernard Punikaia and Anita Una, joined in the unanimous adoption of the report.

The Department of Health was unable to relocate the leprosy program at that time because the University of Hawaii, which was running the Medical School, could not allocate space in the Leahi Hospital complex for the leprosy program.

The Clinton Building had steadily deteriorated. It has never been intended to be a permanent building. It was a war-time building, and the wood had not been given anti-termite and rot treatment. It had rolled asphalt paper type of roofing. It had been designed for use as a nursing facility. The building had 42

---

[4] Defendant's Exhibit #15.

[5] *Ibid.*

[6] The hospital buildings were of concrete construction.

[7] There were many other recommendations, including methods for the handling of newly discovered cases of leprosy, provisions for those living in Kalaupapa, and the necessity for educating the public on the problems of leprosy in the community.

"barracks rooms" (12' x 16' or larger) on each floor, with 9 general service rooms (washrooms, toilets, storage, kitchen, etc.) on the first floor, and 6 similar rooms on the second floor, with a large lobby in the middle of the two wings. Some of the barracks rooms had only wash basins, some had only toilets, a few had neither. There were many with both, but there was full wash, shower, and toilet facilities available in other rooms in each wing on each floor.

Because the building did not meet the requirements of Building and Life Safety Codes necessary to comply with the standards for licensure, the Department of Health attempted to obtain legislative appropriations for renovation and alterations of the Clinton Building. In May of 1971, the Citizen's Committee on Leprosy was reconvened to discuss the legislative appropriations made in 1965, 1967, and 1968 for reconstruction of the Hale Mohalu facility at Pearl City. That *same* Citizen's Committee voted *against* utilization of the appropriated funds for the rebuilding of the Clinton Building.

During these years, there was a steadily decreasing leprosy patient census, with a concommitant steadily decreased use of the Hale Mohalu facility. The Depatment of Health considered the possible use of other state-owned hospitals for leprosy patients. The Citizen's Committee rejected such proposals but felt that removal of the Honolulu leprosy program to the Trotter Building at Leahi Hospital would be satisfactory. Unfortunately, in 1974, the Leahi Hospital was still under the administration of the University of Hawaii, and space was then not available for the leprosy program in any of the hospital buildings.

In early 1974, Acting Governor Ariyoshi initiated what became known as the Gooch-Harrington Study, a joint staff study by Dr. Gooch of the State Department of Health, and Dr. Harrington of the State Department of Budget and Finance. In February 1975, its 149-page report, "The Leprosy In-Patient

Program in Hawaii" was published.[8] As indicated in the "Acknowledgements", "the cooperation of Kalaupapa eligibles and Hale Mohalu eligibles during the attitudinal survey was very important during the study". The report concluded that the steadily decreasing patient census made it impractical to continue the operation of the Hale Mohalu facility as a separate in-patient treatment facility for leprosy patients. The new drugs and treatments had rendered leprosy non-communicable only after a relatively short period of treatment. Thus, almost all new patients could be treated under an out-patient program. The in-patient patients at Hale Mohalu and Kalaupapa, therefore, would be steadily depleted as the "old-timers" died.

The study concluded that the continued operation of Hale Mohalu was economically unsound, and recommended that the patients at Hale Mohalu should either be returned to Kalaupapa or placed in appropriate private facilities at state expense, or returned to the community with state support. A major recommendation was that the Hale Mohalu facility be closed as of June 30, 1974. At that time (February, 1975), there were only *6* permanent residents at Hale Mohalu, some of whom needed skilled nursing services, and an average of 15 Kalaupapa residents using the facility when they were in Honolulu for medical and other reasons. The 6 permanent residents were all "old-timers", since, by then, no new leprosy patients were being admitted for in-patient care.[9]

In recognition of the fact that the Kalaupapa residents were the remnants of those who were afflicted with the disease for many years before effective medications became available, and many of those had residual defects from nerve damage and other crippling aspects of leprosy, during its 1976 session the State Legislature, by Senate Concurrent Resolution #93, established a state policy to permit any Kalaupapa patient desiring to remain there at the Settlement to do so for as long as he

---

[8] Defendant's Exhibit #16.

[9] Plaintiffs' Exhibit #36.

might choose, regardless of whether or not he had been successfully treated. Provision was also made for adequate health care and other services for the lifetime of those patients.[10]

The 1976 State Legislature also turned over the administration of the Leahi Hospital grounds to the Department of Health effective as of July 1 1976.[11]

After that, on February 2, 1977, Dr. Leslie Koch, Chief, Leprosy Control Program, and Richard Young, Administrative Office, Communicable Disease Division, held meetings, separately, with the patients and staff of Hale Mohalu on the Department's plan to terminate the Hale Mohalu operations at Pearl City and, thereafter, establish a revised operation at Lehi Hospital. The record of that meeting reflects that at least 7 patients were present, five of whom were Hale Mohalu chronic-care patients. At that time, the patients were advised that the move "which we have been talking about for the past two years" would occur within the next six months. It was Young's conclusion that the patients seemed to realize that the move was inevitable, and that their main concerns were that they would be provided comfortable quarters. They were then told that it would not be possible to have individual rooms for everyone, but that the Department would try to provide individual rooms for "the five chronic-care patients" then at Hale Mohalu. The transients from Kalaupapa for short-term care were told they would be placed in ward beds. One of the Kalaupapa registrants at the meeting indicated that he wanted a separate room for himself and his wife. One of the Hale Mohalu registrants said that he had to have a telephone and was willing to pay for it himself. Another was concerned about

---

[10] *Ibid.*

[11] At that time, the leprosy program could not be moved into the Trotter Building because it was then being rented to a private nursing home while that home was building its own new facility elsewhere. On March 5, 1977, that lease ended.

her employment so that she could become eligible for a pension. She was assured that work would be given her to be able to qualify her for pension requirements. The main concerns expressed by the patients were for privacy, comfortable quarters, adequate storage space for their personal belongings, and access to a telephone.

The patients were then advised of four alternatives: (1) they could move with the program to Leahi; (2) they could request a transfer to Kalaupapa; (3) they could request discharge and return to the community; and (4) if they preferred to transfer to a private nursing or care home, the Department would explore that possibility and its cost.[12]

On May 4, 1977, the Department held a public information meeting on the relocation of the Hale Mohalu program to Leahi Hospital at 7:0[illegible] p.m. at the Sinclair Auditorium at Leahi Hospital. For that meeting, the Board of Health had sent notices of the Meeting to almost 150 business and professional men and women of the Kaimuki community, along with state legislators and news media persons. Also present were leprosy patients from Hale Mohalu and Kalaupapa. The panel members were Dr. Koch, Richard Young, Dr. Verne Waite, Chief of the Hospital Medical Facilities Branch, and Abe Choy, Administrator of the Leahi Hospital. Dr. Waite stated that Hale Mohalu was dangerous and unsafe and failed to meet the Life Safety Code, and indicated that he was reluctant to continue issuing a license for the Hale Mohalu program to operate in the Clinton Building. The Board of Health stated that the cost to replace the Hale Mohalu building to be around $2 million, but that cost alone was not the basis for the projected move. It was the belief of the Board of Health that the leprosy patients would be getting better medical and nursing care and facilities. The whole spectrum of the history of leprosy and the progress of its treatment were presented for the education of those from the community.

---

[12] Defendant's Exhibit #1.

A Kalaupapa patient expressed concern over whether Kalaupapa patients would be given separate rooms. Another inquired about bathroom facilities. Another was concerned over private rooms. At that time, there were only 5 Hale Mohalu registered patients, and Mr. Young advised them that it was planned to accommodate each of them with single rooms. He also indicated that Kalaupapa patients would probably not be given single rooms, but, rather, ward rooms. Provisions would be made for married patients to have private rooms. All of the questions from the patients about the facilities they would have in the Trotter Building were answered. Not one unfavorable comment was registered. It was obvious, however, that the patients had "reservations about this move and [were] not looking forward to it".[13]

In September 1977, the Department of Health applied to the State Health Planning and Development Agency (SHPDA) for a Certificate of Need to renovate the south wing of the Trotter Building at Leahi Hospital for the Hale Mohalu leprosy program. A public meeting was held on November 8, 1977, at the Mabel Smythe Auditorium at Queen's Hospital in Honolulu. In attendance was James L. Swensen, Administrator of SHPDA. This agency controls the issuance of Certificates of Need for the location and use of any health care facility. Also present were representatives of the Department of Health, six leprosy patients, and members of the public. Written and oral arguments were presented for and against the proposed closing of the facility at Pearl City. Three of the leprosy patients, including Bernard Punikaia, had their round-trip air transportation between Kalaupapa and Honolulu paid by SHPDA. Punikaia, as Chairman of the Patients Advisory Council, read aloud and filed a 4-page typewritten letter addressed to Swensen opposing the closing of the Hale Mohalu program at Pearl City.

---

[13] Minutes of the Board of Health meeting, May 20, 1977; Defendant's Answers to Plaintiffs' First Interrogatory Question #12.

Another public meeting was held on November 17, 1977. Again, Swensen and other SHPDA staff attended, as did George Yuen, the Director of the Health Department and other Department of Health staff. Bernard Punikaia was again present. Also in attendance was State Representative Neil Abercrombie with members of the public. Again, written and oral arguments were presented for and against the closing of the Hale Mohalu facility. Representative Abercrombie spoke against the closing and presented a 2-page letter. Yuen explained the reasons why the Department of Health sought the closing of the facility. The speakers were then questioned by others in attendance.

Another meeting was held on November 29, 1977, at the Clinton Building. George Yuen of the Department of Health and other Department of Health staff and SHPDA staff were there, along with Bernard Punikaia, acting as "Chairman of the Patients Advisory Council". State Representative Neil Abercrombie, as well as the leprosy patients then residing at Hale Mohalu, were also present. The leprosy patients questioned Yuen about the reasons for the proposed closing of the Hale Mohalu facility. Abercrombie and Punikaia presented arguments in opposition to its closing.

On December 1, 1977, the Hawaii Statewide Health Coordinating Council (HSHCC) held a meeting at the boardroom of the Department of Health in Honolulu with 20 committee members present and 14 guests, including Bernard Punikaia and Abercrombie. Also present was Susan L. Arnett, a Legal Aid attorney acting as counsel for Punikaia. (The Council could only make recommendations to the DHEW. Its actions were not final.) One of the items on the agenda was the application by the Department of Health for an Emergency Certificate of Need to relocate the Hale Mohalu leprosy program. At that meeting, Ueoka, Chief of the Administrative Services Office of the Department of Health, advised the Council that on November 15 the licensing division of the Department of Health had stated that the license for Hale Mohalu at Pearl City would not be renewed after December 31,

1977, and, therefore, a Certificate of Need was necessary to close that facility. He then again outlined the problems, possible solutions, and alternatives in providing quarters for the leprosy patients at Hale Mohalu, e.g., moving them to Waimano Home (state hospital for mentally retarded), Hawaii State Hospital (for the insane), Maluhia Hospital (state hospital for the aged), returning the patients to Kalaupapa, housing the patients in hotels, or renovating "the Administration Building" (another old Naval wooden building on the 11-acre site). None of the above was physically or financially feasible. Ueoka reported that the Clinton Building did not meet fire and safety codes. The Board of Health's request for the Emergency Certificate of Need received 12 votes for, 4 against, and 2 abstentions. (Two members had left the meeting before the vote.)

On December 16, 1977, another SHPDA meeting was held at the Hawaii Medical Library in Honolulu. Also attending were Department of Health representatives, 2 persons from the Honolulu Fire Department, State Representative Abercrombie, Bernard Punikaia, and his attorney, Susan Arnett. Again, oral arguments were presented for and against the issuance of a Certificate of Need for the closing of Hale Mohalu and the transfer of the program to Leahi.

On January 5, 1978, the HSHCC again met at the boardroom of the Department of Health, with 20 members present and 10 guests. The Hale Mohalu problem was again reviewed. It was reported that on December 20, the SHPDA met with the Department of Health and the Honolulu Fire Department, at which time the Fire Department stated it had expected the Department of Health to comply with all of the 9 violations the Fire Department had cited within 30-90 days, and the Department of Health reported that 2 of the structural violations would need materials costing $30-$40,000 that would only serve to keep the Clinton Building open for 6-8 months. On December 23, the Final Notice of Violation had been sent to the Director of the Board of Health by the Honolulu Fire Department. Since the Final Notice was incorrect, on December 28 a Corrected Final Notice of Violation had been received by the

Board of Health. On December 30, the Director of the Board of Health had requested that the Deputy Chief Fire Marshal extend the time for the Department of Health either to comply with the violations or move the patients. On January 3, 1978, the State Fire Marshal had granted the Department of Health an extension up to January 23 in which to correct the 9 violations, or move the patients and vacate the Clinton Building. Therefore, the SHPDA issued an approval for a Certificate of Need to allow the patients to be relocated in the Trotter Building.

January 8, 1969, the 11-member Hansen's Disease Committee of the Comprehensive Health Planning Advisory Council (CHPAC) met in Honolulu with Punikaia and another patient, Una, present, along with Dr. Robert Worth (who testified in the instant hearing). At that meeting, the problem of moving the leprosy program out of the Clinton Building to Leahi was discussed. The state's Answers to Plaintiffs' First Interrogatories #12, 13, 14, 15, and 16 show that between that time and January 26, 1978, at least 23 hearings on the subject were held before some health committee, council, or agency; 3 in 1969; 6 in 1971; 1 in 1972; 1 in 1973; 1 in 1974; 1 in 1975; 1 in 1976; 8 in 1977; and 1 in 1978. Some were held at Kalaupapa, some were held at the Clinton Building, and one was held at Leahi. At many of the meetings, Punikaia or other patients were present.

The attitude of those apprehensive of the proposed move is indicated in the Minutes of the November 17, 1977 meeting of HSHCC, where Representative Neil Abercrombie spoke on behalf of the patients of Hale Mohalu. He referred to the Trotter Building as "like being in prison". Punikaia, in his statement at that meeting, indicated that he and four patients of Hale Mohalu had visited the Trotter Building, and stated "they could never accept the south wing [Trotter Building] because it would be like a prison." "The Department of Health is again forcing the patients into isolation."

As indicated, the decision to move the program from the Clinton Building to the Trotter Building was not a hasty one..

It was not an arbitrary decision on the part of the Department of Health. It was done only after a multitude of open public hearings with patients and patients' representatives, and an attorney for those patients.

That the Clinton Building had become unsafe for the purpose intended was obvious even before the Fire Department sent out its notices of violation in December 1977. It had been built as temporary quarters for the young and agile men and women of the Navy and was intended, because of necessity, for emergency war-time use. Its framework did not pretend to comply with the code requirements for buildings to be used as nursing homes for the elderly and sick. Only those who have lived with the problem can appreciate the effect of ground-nesting termites on untreated mainland soft woods. The largest beams can have all, except the annular rings, completely eaten away before the presence of such termites may be discovered. Dry-wood termites steadily take their toll, only usually more obviously. The humidity in Hawaii in such that both wet and dry rot attack the ordinary pine, fir, spruce, and cedar, western-type building materials. The Clinton Building had steadily and dangerously suffered from all such attacks.

By December 15, 1977, there is a report from James R. Early of Martin, Early Consulting Structural Engineers.[14] On the condition of the Clinton Building, he noted, "The building has been fire sprinkled for *some* protection against fire." [Emphasis added.] He observed termites in "those spaces that were opened and could be readily seen". He reported "some major problems [with termites] in the lobby area, where *temporary shoring* has been placed to support the second floor joists that frame into the seriously damaged floor beams and columns". [Emphasis added.] He goes on to say that those temporary shores might be adequate to support the static loads "satisfactorily, with the possible exception of the posts that are supporting the roof and resting on the termite-eaten posts at

---

[14] Plaintiffs' Exhibit #1.

the ground floor level". He continues, "To say that this building is structurally safe would be foolhearty [sic], particularly on a long-time basis. However, for a short term it would be reasonably safe."[15]

The report of Alfred Yee and Associates Engineering, Etc., of December 8, 1977,[16] found the major girders and columns supporting the second floor framing were wood members 12'' x 16'', 6'' x 12'', and 4'' x 12''. The firm's structural engineer, Chang Nai Kim, "estimated that termite infection had destroyed approximately 30% of the cross-section area of the main girder". One of the "two supporting columns of this major girder . . . has lost approximately 33% of its effective cross-sectional area, while the other column has been reduced by approximately 25% . . . due to termite infestation . . . [of] untreated douglas fir lumber". It was his opinion that "termite damage is occurring in the second floor framing and probably throughout the whole building structure". He concluded that the "structure [of the Clinton Hall facility] is in a serious state of deterioration. Every member is suspect of its degree of structural effectiveness . . . major members have been destroyed by over 50% of its cross-section properties". "It is my opinion that many areas may not be able to support gravity . . . and dead and live loads . . . In the event that the Honolulu Building Code and wind and earthquake loads occur, there is significant probability that major damage in the structure would occur. In view of these considerations, it is further my

---

[15] On January 18, 1982, as shown by Plaintiffs' Exhibit #5, an inspection by a termite extermination firm found active dry-wood termite infestation in door frames, door jambs, window frames, window jambs, walls, and cabinets, and subterranean (ground termites) in various areas of 2'' x 10'' floor joists over at least 6 rooms, and infestation in the structural members of the lobby (recreation room) column posts. "It was also noted that wood rot . . . was present throughout the structure, and that the ground termite problem will persist as will the problem of wood rot."

[16] Defendant's Exhibit #3.

recommendation that the Clinton Hall facility is not safe for occupancy . . . this building should be vacated."

As indicated heretofore, in the first part of December 1977, the Fire Prevention Bureau of the Honolulu Fire Department sent to the state a Notice of Violation. The matter was referred to a non-state architect, Douglas K. Sonoda, A.I.A., who reported that he had conducted a site investigation of the Clinton Building, and concluded, "The first 8 of the 9 violations cited can be corrected to meet the present regulations or requirements." The last violation, which required that the building meet the minimum construction standard as stated by the National Fire Protective Association, "is considered to be unfeasible . . . To meet NFPA's requirement of a two-hour fire-resistant construction will necessitate the reconstruction of the entire building." This was because, due to the fire retardancy of wood members, the stud spacing and sizings would have to be changed. He concluded, "To reconstruct the building to meet present regulations will incur a major cost to the State of Hawaii."

On December 28, 1977, the Department of Health received from the Office of the Fire Chief, Honolulu Fire Department, "Final Notice",[17] whereby the state was ordered to provide (a) 40-inch clear width doors for all patients' rooms in the Clinton Building; (b) 1-3/4'' solid wood bonded core doors for all patients' rooms with self door closures and magnetic hold-open devices interconnected to fire alarm and smoke detectors; (c) exit signs with continuous illumination from emergency power source; (d) one-hour separation between corridor, sleeping rooms, and treatment areas, and wire glass for openings limited to 1,296 square inches; (e) separation above doors from wall to wall and floor to floor; (f) Class A or Class B interior finish; (g) electrical interconnect sprinkler system to fire alarm system; and (h) to meet minimum construction standard

---

[17] Defendant's Exhibit #5.

NFPA 220.[18] The Fire Department gave the Board of Health 5 days to comply with its orders.

Of course, it was impossible for the Department of Health to make the changes necessary for compliance within 5, or even 50, days. As indicated above, the Department of Health had already decided on moving the Hale Mohalu program to Leahi. The Department, therefore, on December 30, 1977, requested that the Fire Department extend the period of compliance to January 23, 1978, stating "This time extension will permit us to (1) secure a Certificate of Need, and (2) move the residents to . . . the Trotter Building, Leahi Hospital".[19] On January 3, 1978, the Fire Marshal granted the requested extension under the proviso that during the interim, the Board of Health should implement temporary life safety measures against the hazards of fire and panic, viz., assign an additional hospital attendant to duty at night, quarter the patients in close proximity to each other, seal off the second floor from entry and cut all electricity thereon, and provide two smoke detectors on the first floor.[20]

The Hospital and Medical Facilities Branch of the Department of Health "urged" that the leprosy patients be moved from Hale Mohalu to a safe building. Because it was impossible to transfer those in the Clinton Building to Leahi immediately, a temporary licensure at Hale Mohalu for a period of three weeks was secured in order to give time for the transfer.[21]

On January 12, the Department of Health sent and delivered letters to the residents at the Hale Mohalu Hospital and Kalaupapa Settlement advising that they would be moving into the Trotter Building of Leahi Hospital about January 23, 1978. The letter recognized that some of those in the Clinton Build-

---

[18] This last refers to the NFPA requirements stated in Sonoda's report, *supra*.

[19] Defendant's Exhibit #6.

[20] Defendant's Exhibit #7.

[21] Defendant's Exhibit #9.

ing were reluctant to move, but stated that all efforts were being made to provide for their needs in a "safe, comfortable, and friendly setting". The letter stated that the serious structural deficiencies of the Clinton Building made it unsafe for continued occupancy, and that any attempt at repair would take at least a year, and, even if repaired, it could not fully comply with the Life Safety Code because of its wood construction, that full compliance would demand building an entirely new structure on the site. On January 26, 1978, the transfer of patients took place.

On January 26, 1978, the total number of those afflicted with leprosy at the Clinton Building was 20. Only five of the 20 were "registered Hale Mohalu patients", i.e., those who had no desire to live at Kalaupapa and were either without desire to live out in the general community, or physically so handicapped that they had to have continuous skilled nursing facilities.

All other patients in the Clinton Building at that time were of Kalaupapa registry, i.e., they had homes, assigned to them for life, at Kalaupapa. They were in Honolulu either for medical services that they could not get at Kalaupapa, or for their own personal business and social reasons. In this group were plaintiffs Frank and Mary Duarte. Mary had come from Kalaupapa to Honolulu because she needed kidney dialysis, and her husband, Frank, accompanied her. Plaintiff Clarence Naia was in Honolulu because he was having trouble with his feet, which demanded medical attention. Plaintiff Bernard Punikaia had come from Kalaupapa for the specific purpose of opposing the transfer of any patients to Leahi.

No attempt was made by the state to physically force anyone to move to Leahi. The state still continued to supply electricity and water and food to those who insisted on staying in the old Clinton Building. This condition existed until the latter part of August, 1978, when the state notified those still living in the termite-ridden and structurally unsafe building that it was going to shut off all water and electricity to the building, and

end the food supply on September 1, 1978. When those still there did not leave, on that day the state physically shut off all the water and cut off all electricity and telephone service to the building, as well as ceased to furnish food to the occupants. The state felt it could no longer, even inferentially, be held responsible for the safety of those who continued to occupy the unsafe structure. It was because of this act on the part of the state that the present suit was brought.

It is to be noted that each and every one of the plaintiffs in the first Complaint filed September 5, 1978, were registered residents of Kalaupapa. The plaintiffs did *not* include *any* of the leprosy patients who had been transferred to Leahi in the preceding January. Each and every plaintiff had his or her own home in Kalaupapa. Each and every plaintiff was but a transient visitor at Hale Mohalu, using the same as a state-furnished place of temporary residence while in Honolulu. Each was free, at all times, to return to Kalaupapa or to leave Hale Mohalu and live in the public community.

It would appear from the opinion of the appellate court in *Brede* vs. *Director for the Department of Health, etc.*, 616 F.2d 407 (1980) that the appellate court was never apprised of these facts. That opinion, apparently, was based upon the following factual assumptions:

> Shortly [after March 23, 1977 when "Hawaii's title to Hale Mohalu became a fee simple absolute"] the state began proceedings to close the facility and move its residential and medical support services to Leahi Hospital in Honolulu.
>
> A number of the facility's residents, in apprecitation of the residential nature of Hale Mohalu with its private or semi-private living quarters and easy access of friends and families, chose to remain. Over the last decade, advances in medical science have enabled physicians to treat leprosy patients through outpatient services. As a result, the inpatient residents remaining at Hale Mohalu were among

> the more elderly, afflicted, and crippled of the leprosy population.[22]

While it is true that Mary Duarte, one of the leprosy patients who remained behind, was elderly and crippled, both she and her husband, Frank, were residents of Kalaupapa and were in Honolulu solely because Kalaupapa did not offer the kidney dialysis treatment that she required. Even she was in no sense a "permanent resident" of Hale Mohalu. Her house and home were in Kalaupapa. She was in Hale Mohalu only as a transient visitor. All the others who remained behind were but transient visitors from Kalaupapa.

As will appear more specifically hereafter, the facility at Leahi has been, and now is, prepared to give to the Kalaupapa transients the same medical and physical care that were supplied them at Hale Mohalu. It, of course, could not permit the transients to have three dogs in the lobby and a horse in the front yard, as is now the situation at the Clinton Building, nor does it permit transients to have the absolute and unrestrained freedom of having visitors, parties, and celebrations at any time they may desire, as now enjoyed by those still using the Clinton Building.

The new Leahi facility has almost precisely the same rules and regulations which were in full force and effect at the Clinton Building prior to January 26, 1978.

The *Brede* court considered the issues of entitlement. The record now makes certain that the Hale Mohalu facility never purported to be a Medicaid intermediate care facility within the meaning of 42 C.F.R. 499.10(b)(15) (1977). Thus, it was not a facility to which those patient transfer regulations applied. The patients at Hale Mohalu were *not* entitled "to a fact-finding hearing as to the cause of their transfer".[23]

---

[22] P. 410.

[23] P. 411.

THE BREDE COMPLAINT AND APPELLATE OPINION:

As this judge read the appellate opinion in *Brede*, it seemed that the *Brede* court had comingled the January 26, 1978 transfer with the September 1, 1978 cut-off of facilities for those Kalaupapa transients still using the Clinton Building.

As the September 5, 1978 Complaint states, the plaintiffs "are protesting the September 1, 1978 order by the Department which cut off the electric power, water, telephone, food service and medical services previously being supplied to Hale Mohalu".[24]

Plaintiffs therein acknowledged that they were "leprosy patients of Kalaupapa who are presently staying at . . . Hale Mohalu".

Plaintiffs' basic prayer was for "(4) an immediate order [that] 'the Department both temporarily and permanently . . . return water, power, food service, telephone and medical services to Hale Mohalu'; (5) an order allowing 'the patients/ Plaintiffs the right to permanent use of the Hale Mohalu facility'."[25]

The *Brede* court recognized that under the Hawaii state law, the Hawaii Health Department has the unrestricted power to prescribe the place of treatment of leprosy patients, and the statutes appear to authorize patient transfers at will.[26] The only services to which the plaintiffs, all Kalaupapa transients, were entitled were to have free transportation to and from Kalaupapa to any facility which could supply them with such temporary medical attention and nursing care as might be required to assist them to keep in good health during such time as they might be in Honolulu. On September 1, 1978, the state did "not act so as to reduce those services to the point of

---

[24] Brede Complaint, p. 1.

[25] *Ibid*, p. 5.

[26] P. 411.

imperiling life or imposing other severe hardships" upon any of the Kalaupapa transients still in the Clinton Building. As is shown by all of the pictures of the facilities available at Leahi[27] and the testimony regarding the same, when compared to the leaky, termite-riddled structurally unsafe Clinton Building, the Leahi facility then gave and still gives far, far better care to all leprosy patients then or now using the Clinton Building for their Honolulu headquarters while away from Kalaupapa.

All the Leahi facilities had been available to those persisting on staying in the Clinton Building during the seven months after the Hale Mohalu program had been transferred to Leahi. Some of the plaintiffs had used its medical facilities during that period.

Thus, the state did not reduce any of the services it was obligated to supply to those suffering from leprosy when it closed out the program at the Clinton Building in January. It did not impose any hardship at all upon the Kalaupapa transients other than (1) the dangers of being transported approximately 12 miles through city traffic from one facility to the other; (2) living in different sized, but structurally safer, rooms; and (3) making them readjust to new shops and restaurants. Transportation was and is supplied by the state to the leprosy patients for shopping and other necessary services.

Moreover, the *Brede* plaintiffs had never been "transferred". Most had never moved out—some had *moved in* after January 26. They were all free to return to their Kalaupapa homes or out into the general community. The state was prepared to give them all necessary medical services—but not necessarily at the Clinton Building. It was prepared to give them power and water and food and shelter, as well as medical services at Leahi—if the plaintiffs *chose* to go there. The state has never forcibly attempted to transfer these plaintiffs to Leahi, nor has it forcibly transferred them out of the Clinton

---

[27] Defendant's Exhibit #27.

Building. All that the state actually did on September 1, 1978 was, in effect, to say to the plaintiffs that the state would no longer assist them in any way in remaining in that unsafe building.

Nevertheless, the *Brede* court, *sua sponte*, suggested to the plaintiffs the *possibility* that they *might* have suffered a reduction in the services supplied them by the state "to the point of imperiling life or imposing other severe hardship"[28] because "transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients."[29]

It appears to this judge that the "transfer trauma phenomenon", even if it had any legal basis for being transformed into a "due process deprivation", could not have applied to the plaintiffs—all of whom were from Kalaupapa. The Clinton Building was never their "home". For them, it was only the "motel", with some medical services available, supplied by the state for them when they were in and out of Honolulu on the way from and to their homes in Kalaupapa.

It would appear, however, that the phenomenon of transfer trauma which concerned the Court of Appeals no longer may validly be construed as constituting a "deprivation cognizable under the due process clause". The acceptance by the trial judges in *Bracco* v. *Lackner*, 462 F.Supp. 436 (N.D. Cal. 1978), *Klein* v. *Mathews*, 430 F.Supp. 1005 (D.N.J. 1977), and *Burchette* v. *Dumpson*, 387 F.Supp. 812 (E.D.N.Y. 1974) upon which the Circuit Court based its conclusion that the "phenomenon known as 'transfer trauma' "[30] was a judicial and scientifically accepted medical fact is no longer legally valid. In *Helen B. O'Bannon* v. *The Town Court Nursing Center*, 447

---

[28] *Brede*, p. 412.

[29] *Ibid.*

[30] *Brede*, p. 412.

U.S. 773 (1980), Justice Blackmun, in his concurring opinion, stated that

> "The fact of the matter, however, is that the patients cannot establish that transfer trauma is so substantial a danger as to justify the conclusion that transfers deprive them of life or liberty. Substantial evidence suggests that 'transfer trauma' does not exist, and many informed researchers have concluded at least that this danger is unproved.[12] Recognition of a constitutional right plainly cannot rest on such an inconclusive body of research and opinion."[31]

As indicated above, none of the plaintiffs have, nor could they show, any "transfer trauma" because they were not, and could not claim to be, forcibly transferred from any "home". Even without reaching that conclusion, however, this court feels that Justice Blackmun's opinion disposes of any possible constitutional claim of deprivation by these plaintiffs based upon allegations of "transfer trauma".

The court, in *Brede*, assuming that a possible entitlement to a due process hearing might exist, remanded the case to the district court to "hold hearings designed to ascertain whether the plaintiffs have an entitlement to services at Hale Mohalu arising out of either the Medicaid regulations or from the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on the plaintiffs. If such an entitlement exists, then the adequacy of the hearings already held must be ascertained and any hearings necessary to afford appellants due process should be held."[32]

THE PUNIKAIA COMPLAINT:

Following remand, plaintiffs, on May 10, 1980, filed an Amended Complaint in order to incorporate a claim of "intentional infliction of emotional distress" based upon the circuit

---

[31] *O'Bannon*, p. 804.

[32] *Brede*, p. 412.

court's transfer trauma theory of possible entitlement. In that Complaint, both the order of precedence and some of the parties had been changed. Bernard Punikaia became the lead plaintiff; Clarence Naia was moved into position behind the Duartes. Leon Nono, Jubilee Pudhala, and Antonion Sagadraca and Shivuku Sagadraca were dropped. Sam Kaliko was added.[33] As stated previously, none of these plaintiffs ever intended to use the Hale Mohalu facility as anything but a housing, resting and care facility whenever they were in Honolulu. Their homes had been, and still are, in Kalaupapa.

Bernard Punikaia's name, properly, should head the list of plaintiffs. Although his face, hands, and feet show the ravages of the disease which had afflicted him from the age of 6, he, today, at age 53, is clearly the most intelligent of all of the plaintiffs who testified in court. He speaks well and fluently. He is fully ambulatory, drives his own car, and has been the representative of the Kalaupapa patients on all of the problems of the leprosy program from 1969, when he, as a member of the Citizen's Committee on Leprosy, *supra*, appoved the proposed shift of the Hale Mohalu program from the Clinton Building to Leahi. When, in the late 1970's, it became apparent that a move was going to be made, he turned to a position actively and vocally opposing any move out of the Pearl City facility. As noted above, he appeared at every one of the public meetings held on the subject, twice accompanied by counsel. After the HSHCC, on January 5, 1978, had granted the Board of Health an approval for a Certificate of Need to transfer the Hale Mohalu patients to the Trotter Building at Leahi, it was Punikaia who, on January 20, 1978, filed the Complaint in the Hawaii state courts seeking to enjoin the planned transfer.[34]

---

[33] The plaintiffs also stated that this action was brought "individually and on behalf of all others similarly situated". No action was taken either by the plaintiffs, the defendant, the district magistrate, or the district judge to determine whether this should become a class action, nor was this problem ever presented to the Appellate Court after appeal from Judge King's rulings on the case.

[34] This is more fully discussed, *infra*.

When all of those residing in the Clinton Building were notified that the move would take place on January 26, 1978, he was at his home in Kalaupapa. As Punikaia testified during the present hearings, he then came to Honolulu and moved into Hale Mohalu on that day for the purpose of protesting the move. Except for occasional trips back to his home in Kalaupapa, he has remained in the Clinton Building ever since and expects to remain there until this case is settled. He is clearly the most outspoken and aggressive champion of the position taken by the plaintiffs, viz., that they do not propose to leave the Clinton Building or use the Leahi facility.

On May 19, 1980, the plaintiffs again filed a Motion for a Temporary Restraining Order that would mandate the state to restore all electrical power, water, food, telephone, and 24-hour nursing services to the Clinton Building. On May 20, 1980, U.S. Magistrate Thomas Young heard the plaintiffs' Motion, and on June 11, 1980, in his report and recommendation to the district judge, recommended denial of the plaintiffs' Motion. The plaintiffs filed objections to the magistrate's report, and on June 28, 1980, U.S. District Judge King affirmed that report. Thereupon, the plaintiffs filed an appeal to the Ninth Circuit following which, on November 27, 1981, the Ninth Circuit remanded this second appeal back to this court for an evidentiary hearing. On January 25, 1981, this judge began the hearing mandated by the Circuit Court. This took five trial days.

THE PUNIKAIA OPINION:

In the November 28, 1981 Order of the Circuit Court, the *Punikaia* panel stated that the opinion of the *Brede* panel "indicated that the plaintiffs' claims do have some merit, and we expressly reject the magistrate's conclusion to the contrary". The first part of the above conclusion of the second panel was *incorrect*. Nowhere in its opinion did the *Brede* court conclude either legally or factually that the plaintiffs' claims actually had any merit. To the contrary, it threw out most of the plaintiffs' claims as having no merit whatsoever. All that

the *Brede* court found was that the plaintiffs' claims might *possibly* have some merit. Although the *Brede* court discussed the matter of plaintiffs' possible entitlement to continued operation of the Clinton Building *if* it were determined that Hale Mohalu qualified as a Medicaid intermediate care facility, or *if* the patients had an entitlement under Hawaii statutory law, or *if* the relocation would bring about the phenomenon of transfer trauma, it did no more than express the *possibility* that the plaintiffs might be entitled to a hearing before any transfer was made. Because the *Brede* court, on the record before it, felt unable to determine what the actual facts surrounding the Hale Mohalu problem were, it remanded the case to the district court to

> "ascertain whether the plaintiffs have an entitlement to services at Hale Mohalu arising from either the Medicaid regulations or from the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on the plaintiffs. If such an entitlement exists, then the adequacy of the hearing already held must be ascertained, and any hearings necessary to afford appellants due process should be held."

From the above, it is manifest that the *Brede* court did not reach any conclusion upon the merits of plaintiffs' claims. Nevertheless, because the district court judge did not specifically and in detail adopt the findings and conclusions of the magistrate, even though the order of the district judge agreed with the magistrate's recommendation that relief be denied, the *Punikaia* court ordered that the district court should hold an evidentiary hearing to consider, "under the present circumstances", the eight specific questions hereafter set forth "among others" this district court "may consider important".

1. "a. Which of the named plaintiffs are now living at Hale Mohalu? Are they full-time or part-time residents? Were all of those persons who are now at Hale Mohalu there at the time the State closed the facility?"

It has been stipulated by the parties that of the 13 original plaintiffs, i.e., those who were in the Clinton Building on

September 1, 1978 when the state shut off water, electricity, and telephone connections to the building and ceased supplying free food, janitorial services, and any medical care at that building, *only three* are still and now living there on a *full-time* basis—Bernard Punikaia, Clarence Naia, and Frank Duarte.[35] Each and every one of those three have houses (homes) in Kalaupapa and are registered as permanent Kalaupapa residents.

Frank Duarte, with his wife Mary, came from their Kalaupapa home in 1976 because Mary needed kidney dialysis, a treatment which she could not get at Kalaupapa. She was not given this treatment at Hale Mohalu, but rather at St. Francis Hospital in Honolulu. Her husband, Frank Duarte, came only because he wished to be with her. Mary Duarte is now dead. Frank Duarte testified during the hearing before this court that as soon as this case was over, he was returning to Kalaupapa.

Clarence Naia came from Kalaupapa to Hale Mohalu in 1977 for medical treatment. At the time of the trial, he was recovering from a recent operation on a foot and testified from a wheelchair. Before the hearing was concluded, however, he no longer needed the wheelchair and was able freely to move around with crutches. Clarence Naia testified that he, too, was going to leave the Clinton Building and return to his home in Kalaupapa just as soon as this case was over.

Bernard Punikaia testified that he has his home in and is registered as a voter from Kalaupapa, and in 1980 ran as a candidate for memership on the Office of Hawaiian Affairs for the Island of Molokai. He also testified that he had come to the Clinton Building from Kalaupapa in January 1978 solely to protest against and oppose the transfer of the leprosy program facilities from the Clinton Building to Leahi.

---

[35] Stipulation, January 14, 1982.

All of those leprosy patients who were "Hale Mohalu registry patients", i.e., full-time residents of the Clinton Building prior to January 26, 1978, were, on that date, transferred to the Trotter Building of Leahi Hospital. As heretofore pointed out, the only leprosy patients who remained behind in the Clinton Building on that date were those who had houses (homes) in Kalaupapa and were in Honolulu only for medical attention or other personal reasons. Plaintiffs Paul Harada, Leon Nono, and Bernice Pupule, each and every one of whom are Kalaupapa registry patients with each having a house and home there, were not in the building on September 1, 1978, but came to Honolulu after that date and are now living in the Clinton Building—admittedly—on a *part-time* basis.[36] Not one of the above-named plaintiffs now living in the Clinton Building requires hospitalization. Some, on occasion, may require nursing or medical attention.[37]

2. "b. If basic services were restored at Hale Mohalu, would other members of the plaintiff class return to the facility? If so, how many would return?"

To give some response to this question, a survey was taken by plaintiff Paul Harada, with the assistance of Bernard Punikaia, of 109 out of he 125 patients in the residential program at Kalaupapa and Leahi Hospital, including, of course, the 3 plaintiffs Punikaia, Naia, and Duarte. Harada reported that out of the 109 patients contacted, 84 said they would "prefer" Hale Mohalu; 11 preferred Leahi, and 14 stated no preference. As the plaintiffs stated thereafter,[38] the "survey was not a scientific survey of the patients but is the only one which has been done", and conceded, "It is impossible to determine precisely how many would return." No definite commitment

---

[36] Stipulation, p. 2.

[37] E.g., Naia and Harada.

[38] Plaintiffs' Proposed Findings of Fact re Ninth Circuit remand, p. 5.

was called for by the question as presented to the patients. An overwhelming majority of the patients responding were permanent residents of Kalaupapa, who would come to Honolulu on such occasions as their own particular needs might call for. Punikaia's participation in the survey makes even the "preference" responses suspect. His activities in attempting to keep the state from closing the Clinton Building is common knowledge among the patients.[39]

After hearing Harada and Punikaia, this court could give no weight whatsoever to the survey as giving any facts upon which this court could evaluate any of the underlying *issues*.

> 3. "c. What would be the cost to the State of reinstating and providing water and utility service, food delivery, telephone services, medical supplies, and nursing and janitorial services? How do those costs compare to the cost of providing care for the plaintiffs if they were at Leahi Hospital?"

The cost of providing water to the Clinton Building could not be specifically determined, but the plaintiffs estimated it would be less than the $130 per month now being spent by the state for water service to the Trotter Building and patients' cottage at Leahi. As the plaintiffs also admitted, the cost of medical supplies per individual is unknown, but both parties agree that the utilities and other costs would be essentially the same as those at Leahi. It was stipulated that the cost of providing the services at Leahi would be: (1) To purchase and prepare three meals a day, the cost is $10.20 per patient/day. If 10 of the plaintiffs lived in the Clinton Building all of the time, this would run to about $37,000 per year. (2) For medical supplies, viz., including dressings, medication, etc., and excluding personnel costs, equipment and transportation costs relating to providing medical services, it was stipulated that there should not be any significant difference between the cost per patient for providing medical supplies at Leahi as opposed to Hale Mohalu. The cost budgeted for 10 nurses at Leahi for

---

[39] Testimony of Punikaia.

fiscal year 1981-82 is $185,000. The plaintiffs requested, in their Motion for Temporary Relief, that the state provide one nurse per shift, around-the-clock (i.e., 3 shifts per day, 7 days per week). It was estimated that this would require the employment of 4.2 nurses, at a cost of about $77,000 per year. For janitorial services, the cost budgeted for 2 custodians for fiscal year 1981-82 is $22,620. The plaintiffs requested that the general janitorial services they felt required at Hale Mohalu would be about one day per week. The cost for this, therefore, would be $2,000 per year. The electrical service required would cost about $940 per month (over $11,000 per year). For telephone service, the cost would be about $128 per month (over $1,500 per year).

From the above, it can be seen that at present it is costing the state over $250,000 per year to maintain Leahi as a skilled nursing facility. For maintaining the leprosy patients from Kalaupapa,, as plaintiffs have requested in their Motion for Temporary Relief, the cost would be over $120,000 a year.

The above attempts of this court to answer this specific question of the *Punikaia* panel does not properly reflect the situation facing the state in respect to caring for leprosy patients. The leprosy patients, particularly the "old-timers" from Kalaupapa, are very susceptible to other chronic diseases and afflictions. Because of loss of sensitivity in their hands and feet, they can receive injuries to the same, e.g., burning, cutting, smashing, etc., without being aware of the injury. For these reasons, leprosy patients require higher levels of care and treatment than plaintiffs requested in their prayer for relief, or are inferentially contained in the questions of the appellate court. These "old-timers"—and every one of the plaintiffs are "old-timers"—are the older patients whose faces, hands, and feet show the ugly erosion of the body that leprosy brought about before the new drugs were discovered, and who are subject to chronic physical ailments. They, thus, require a higher level of care and treatment than is necessary for most of the 600 or more leprosy patients now living in the community. The services requested by the plaintiffs in their prayer for

relief are actually inadequate to provide the care necessary for the "old-time" leprosy patients. All of those basic, needed services can now be provided most adequately at the Leahi facility.[40]

The preceding comparison of costs does not portray the entire factual picture involving the use of the Clinton Building. Even to provide space for an average of 15 occupants, that building is in such a "rotten" condition[41] that the entire second floor would have to be torn off. Over half of the rooms on each wing of the first floor are also unsalvageable. Those wishing to use that facility, perforce, would have to be removed therefrom for the months necessary to tear down and essentially completely rebuild a portion of the first floor. Any such building would have but limited use and a short life span.[42]

As of the present time, any such structure would not meet the needs of the present residents at Leahi. Leahi offers inpatient care services, and Leahi Hospital would have to continue to be operated even if the plaintiffs were successful in this suit. To incur the cost of operating facilities at Leahi and Hale Mohalu would be, to this court, fiscally and administratively unsound and inefficient. The cost of renovating and reestablishing the Clinton Building, when measured against the use now made thereof, or even the cost of merely meeting plaintiffs' demands. as outlined, would be prohibitive.[43] The cost of running two institutions, one for the purpose of providing a hostel for leprosy victims transitorily present in Honolulu, could only be justified if one were to adopt the rationale of Sister Maureen Keleher of St. Francis Hospital, i.e., that they should be given everything they want.

---

[40] Fact Stipulation, p. 4; testimony of Drs. Waite, Worth, and Dodge.

[41] See pictures, Defendant's Exhibit [illegible].

[42] Testimony of Earl Hunter.

[43] Testimony of Chaty Hunter, Drs. Waite and Bomgaars, and Defendant's Exhibit #23.

4. "d. Are the buildings that constitute the living facilities at Hale Mohalu an imminent hazard to life and health? If so, what would be the cost of making the facility reasonably safe for temporary use pending a final decision in this case?"

At the present time, the Clinton Building is unsafe for human habitation and clearly constitutes a hazard to the safety of anyone entering that building.[44] James Early, a structural engineer retained by the plaintiffs, testified as to an earlier inspection of Hale Mohalu that he had made in 1977, and stated that the building even then was unsafe and dangerous.[45] He testified that he cannot determine the present extent of termite damage, but that it would be equally foolhardy to state that the building is any safer now than it was in 1977.[46]

At present, no one uses the second floor of the Clinton Building. Electrical current to that floor has been cut off. On the first floor, only the central lobby area, a few adjoining dormitory-type rooms, an adjoining kitchen, and four lavatories are used by the plaintiffs. The rest of the ground floor rooms are not used.[47]

Clinton Hall was always roofed over with composition roofing paper. The roofing material is now worn out and the supporting sheathing under it suffers from wood rot, termite damage, and water damage. The same eroding factors have destroyed the structural integrity of not only the roof, but also of the supporting rafters and nailers underneath the roof covering The roof sags. It has a multitude of holes in it. Through the holes and cracks runs water leaking down through both floors to the ground beneath. Plaintiffs, in an endeavor to

---

[44] Testimony of Stan Char; see Exhibit #27.

[45] See note #14, *supra*.

[46] Testimony of Early; see Exhibit #1.

[47] Testimony of James Early, Thomas Ryan, Stan Char, and Bernard Punikaia.

try to divert some of the water and drain the same through the windows, have suspended plastic sheets from the ceiling and draped them over and out of windows.[48]

The second floor is termite infested. The walls, the supporting studs, and about 50% of the floor have been so damaged by termite and water that in many places one can easily put his foot through the floor. The live termites are active and visible.[49] The first floor of the building is also termite-ridden. Ground termites normally infest a building from the ground up. Thus, more termite damage is expected to be found in the first floor than in the second.[50] The lobby areas on both the first and second floors are likewise termite infested and water damaged.

The first floor lobby, which apparently is the central living area of the plaintiffs, has the large columns which support the second floor and the roof. These columns have been so damaged by termites that they are unable to support the weight of the floor and roof above. At the present time, they are shored up by outside timbers in order to sustain some of their supporting ability. One of the main columns of this first floor lobby area is so badly eaten by ground termites that an 8-inch ice pick probe was easily pushed into the column up to the handle without meeting any resistance from what should have been a solid wood column.[51] The ceilings on both the first and second floor are made of canec, a cane fibre board formerly made in Hawaii but now no longer manufactured. At present, over 50% of the ceiling panels are either hanging loose from the ceiling or have fallen down on the floors below exposing the rotting nailers and rafters above.[52] The staircases and ramps both

---

[48] Testimony of Stan Char; Defendant's Exhibit #27.

[49] Testimony of Stan Char.

[50] Testimony of Stan Char.

[51] Testimony of Char and Defendant's Exhibit #27.

[52] *Ibid.*

inside and outside the building are in such rotted condition that they are no longer usable. There are large holes in the stairs. The stair railings are either termite damaged or are no longer in existence.[53] The sidings are termite infested, as are many of the studs behind the walls which support the building.[54]

James Early testified that termite damage is not always visible, and he stated that when inspecting the building at the request of the plaintiffs, he did not probe into the support columns in the lobby, did not go on top of the roof, did not examine behind walls; nevertheless, he found evidence of active termites within the building. Early noted that one of the main support columns in the first floor lobby was buckling and testified that the extent of termite damage greatly affects the structural integrity of the building.[55]

Joseph DuPont, called by the plaintiffs as a waterproof consultant, testified that the roof over the Clinton Building could be repaired on a temporary basis with an expectation that it would last a year at a cost of between $15-$20,000. For a more permanent roof covering, it would cost $30-$35,000. DuPont testified he was not a structural engineer and did not know the structural integrity of the roof. He had made no inspection of the supporting framework of the building under the roof. He admitted that he had found the roof in poor condition with pits and visible sags. He stated that he had not seen any holes on the roof. This statement alone renders his testimony somewhat suspect because structural engineer Char, and more particularly the photographs contained in Defendant's Exhibit #27, show the holes in the roof. DuPont admitted that if the roof sheathing and its structural support were not safe, then re-roofing would not work.

---

[53] *Ibid.*

[54] *Ibid.*

[55] Testimony of James Early; Plaintiffs' Exhibit #1.

The cost of repairs necessary to meet the minimum standards required under the building codes of the City of Honolulu and State of Hawaii for the use of the building as a skilled nursing facility was estimated to be in excess of $1 million. Earl Hunter, architect and cost estimator, testified that the present cost would be $880,000 for construction, plus $72,000 for consultant services and design cost, $33,000 for staff costs, and $25,000 for the design contingency costs. These figures, as Hunter testified, do not include the cost of termite treatment necessary to attempt to rid the structure and ground of termites (approximately $20,000), the cost of repairs for exterior stairs or hooking up utility services, approximately $10,000. Additionally, the cost of furnishing equipment and other necessities for occupants of the building are not included in the figure. The cost required to make the necessary repairs and renovation to meet the minimum standards far exceeds the benefits which would be realized by the three plaintiffs now living in the Clinton Building. Presupposing that permits could be secured to allow partial repairs and renovations (and this appears highly improbable), even if the building were partially torn down and revamped to be but a portion of the first floor, the structural integrity of what was left, as repaired, would still be uncertain.[56]

The plaintiffs maintain that if some $1,200 were spent on labor and materials for shoring up the columns in the lobby area and installing metal bracing on the interior and exterior side walls, and $15-$20,000 were spent to install a single layer asphalt cap on the roof, and another $1,900 were spent to put the electrical system into safe operation, the Clinton Building could be put in a condition that it would not constitute an imminent danger to life and health.

Each of the witnesses who testified on the several items of repair, viz., Ryan, DuPont, and Honeychurch, indicated that such repairs could only be construed as temporary repairs.

---

[56] Testimony of Char and Hunter.

From the evidence given to this court, this court, in all justice, could not, nor would not, order the state to spend any money on the Clinton Building in order to make the facility "reasonably safe for temporary use by the plaintiffs pending a final decision in this case". Any money so spent might better be tossed to the winds for the finders to keep.

"e. What is the nature of the facility at Leahi Hospital? What type of living accommodations are provided, and what restrictions are imposed upon the occupants?"

The parties have stipulated:

a. Leahi Hospital consists of a number of buildings occupying a one-block area in a residential neighborhood in Honolulu. The leprosy patients are housed in the Trotter Building, which is a one-story building on the hospital property. One wing of the Trotter Building is used for the leprosy patients, while the other wing of the building is unoccupied.

b. There are thirteen (13) patient rooms at Leahi Hospital, providing twenty-one (21) beds. There are six (6) single rooms, four (4) two-bed rooms, two (2) three-bed rooms, and one isolation room. Patients in single-bed rooms have their own bathroom facilities, those in multi-bed rooms share common bathroom facilities with the other patients.

c. In addition to the patient rooms there is also a day/recreation room, a doctor's office, a dispensary, a chapel, and a kitchen. There are also several staff offices in the facility.

d. The facility is in complaince with Life Safety Code requirements for its designated use.

e. Leahi Hospital provides limited acute care services,[2] skilled nursing care services, intermediate nursing care services, care home services, and out-patient services to persons who have contracted, or are suspected of having contracted, leprosy.

---

2. Kalaupapa registry and Hale Mohalu registry patients who require general acute intensive care services

are admitted to a general hospital, usually Queen's Medical Center, or St. Francis Hospital, under the care of private physicians. Acute patients who can be cared for at Leahi Hospital are provided for at the facility.

In addition, evidence shows that the Trotter Building at Leahi Hospital is part of the state's leprosy program for the use not only by the Hale Mohalu registry patients, but also for Kalaupapa registry patients who come to Honolulu for medical purposes, as well as for those leprosy patients listed on the out-patient registry who, from time to time, may require medical care relating to their disease.[57] For any leprosy patient living at Leahi Hospital, the state provides total care and treatment. Total care includes providing housing, food, transportation costs related to medical care, full medical and nursing care including insulin shots, and clothing needs.[58]

Of those patients who were transferred to Leahi on January 26, 1978, none has indicated dissatisfaction with the Leahi facility or with the move itself. Some patients have indicated that living conditions at Leahi are better than those at Hale Mohalu.[59] Paul Harada, one of the plaintiffs in this case, testified that Leahi is beautifu".

The same house rules and state regulations which were in full force and effect on the leprosy patients living at Hale Mohalu before it was closed on January 26, 1978, remain the same restrictions now imposed on the patients in the Trotter Building and its cottage at Leahi.[60] Those presently using the Clinton Building, of course, have no such restrictions. Their restrictions are only those which they impose upon themselves. Thus, they can, and do, have dogs in the building with them and have a horse tied on the grounds outside. They can throw parties at any time and on any occasion and under any

---

[57] Testimony of Dr. Bomgaars.

[58] Testimony of Drs. Bomgaars and Waite.

[59] Testimony of Drs. Waite, Koch, and Richard Young.

[60] Fact Stipulation; Exhibits A and B.

circumstances as they so desire. Of course, they would not have that same unrestrained freedom of action and from responsibility if they were living at the Leahi facility.

6. "f. Are the plaintiffs who have already moved to Leahi Hospital suffering disadvantages that they would not have suffered at Hale Mohalu?"

As to other claimed disadvantages, the plaintiffs maintain that the patients who moved to Leahi Hospital suffered "the disadvantages of being subject to the stress and trauma of their actual relocation and the disadvantage of being in a hospital atmosphere", and "of being denied to them 11 acres for recreational purposes, a garden, and horses", and that those now at Leahi are suffering from the disadvantage of being separated from those who didn't move with them.

It must be noted that the above-claimed disadvantages apply only to those patients now using the Leahi facility. Those patients, however, are not the plaintiffs in this case.

Contrary to the plaintiffs' claims, the doctors who were treating the patients at Hale Mohalu before its closure on January 26, 1978, testified that there were no significant changes in the medical or physical condition of the patients after their move. The doctors' records substantiate this testimony. All of the patients had other chronic diseases and there did not appear to be any acceleration of any of their medical conditions following the transfer.[61] Those same doctors testified that they had not observed any stress or increase in stress because of the move, nor did they find anything in the medical records to indicate any such stress or increase in stress.

The state presented three statistical studies of the mortality rates of leprosy patients who had been transferred. One compared the expected number of deaths of those transferred or subject to transfer to the general Hansen's disease population. Another study compared the death rates of all Hansen's dis-

---

[61] Testimony of Drs. Waite and Koch.

ease patients before 1969 to those of Kalaupapa and Hale Mohalu after 1969, and the death rate of all Hansen's disease patients from 1955 through 1968 to those same patients after 1969. Based upon the above testimony, as well as that of Don Harris and defendant's Exhibit #20, this court could find no significant statistical difference in the mortality rates of those whom plaintiffs claimed were traumatized by the threat of or actual moving of the Hale Mohalu patients in January 1978.

Dr. Robert Worth, who testified on behalf of the plaintifs, stated that all of the leprosy patients "are masters at adaptation", and that those who were moved to Leahi would be expected to successfully adapt to their new environment.

This court finds that those who moved to the Leahi complex have not suffered any fundamental disadvantages because of the transfer. Actually, the Leahi complex is much more adapted to give to leprosy patients the quality of their needed care than was ever possible at the Clinton Building.

7. "g. What is the source and nature of the food, medical and utility services presently available to the plaintiffs at Hale Mohalu? To what degree do these provisions adequately serve the plaintiffs' basic needs?"

The plaintiffs provide and prepare their own food. They pay for their food out of their own funds, with cash gifts from persons in the community, from funds raised by conducting bazaars and luaus, and some donations of foodstuffs by their friends.[62] No medical services are provided at the Clinton Building. Any leprosy patient, whether a plaintiff or not, will be treated on an out- or in-patient basis at Leahi. If acute care is required, any leprosy patient will be admitted to a general hospital and the cost of all medical services are assumed by the state.[63]

---

[62] Testimony of Ms. Sandy Galavin and Bernard Punikaia.

[63] Stipulation, *supra*.

In September 1978, the then Mayor of Honolulu was a candidate for the Democrat's nomination for Governor of the state. When the state, with the approval of the incumbent Democrat governor, cut off the electrical and water services to the Clinton Building, the mayor immediately authorized connection of a water line to a city fire hydrant and supplied a city electrical generator to those then occupying Hale Mohalu. The plaintiffs purchase the fuel for the generator out of their own funds. The gas used to heat water in a single water heater is propane, purchased by the plaintiffs out of their own funds. The patients have had a single telephone line installed at their own expense. No janitorial services are provided by the state.

In addition to the state-provided medical services indicated above, some of the plaintiffs are eligible for, and receive, pensions from the state, and all of the plaintiffs receive cash allowances, food allowances, and clothing allowances from the state. The average total amount received by each plaintiff is $260 per month.

One of the plaintiffs, Frank Duarte, is diabetic and must have daily insulin injections. Because he has lost some of the sensation in his hands and portions of some of his fingers, he finds it difficult to administer the injections to himself. If a nurse were supplied, the nurse would do it for him. Nevertheless, without that assistance at the Clinton Building, Duarte has survived and still lives there.

> 8. "h. At oral argument before this court, the parties referred to a residential facility constructed adjacent to Leahi Hospital subsequent to issuance of the district court order. (The facility was variously referred to as a 'cabin' or a 'home-like facility.') How does the cost expended by the state to construct this facility compare to the cost of providing the requested basic services at Hale Mohalu? How do those construction costs compare to projected costs for necessary restoration or remodeling at Hale Mohalu, if any?"

The parties stipulated to a partial response to this question.[64] What is now the patients' cottage at Leahi was formerly quarters for nurses. In May of 1981, it was renovated and furnished by the state at a cost of some $63,000. It is a two-story building with 3 double rooms and 10 single rooms. One of the double rooms and 3 of the single rooms are located on the first floor. Patients with wheelchairs have access to those rooms, and there is room enough to maneuver the wheelchairs inside them. The cottage has been freshly painted, has excellent toilets, spacious rooms, and adequate furnishings. Plaintiff Harada testified that the Leahi cottage is "beautiful". Dr. Bomgaars testified that the rooms were pleasant, comfortable, and homey. The above conclusions are borne out by the pictures.[65]

The rules state that patients are allowed to stay in the cottage for no more than two weeks in one month, and no more than two consecutive weeks at any one time. However, patients are able to make arrangements with the administrator to stay, and have stayed, in the cottage beyond the two-week period.[66] As indicated, the same rules apply in the cottage as applied at the Clinton Building, i.e., visitors only in the living room and not in individual patient rooms; no pets or animals; no alcoholic beverages; and 10:00 p.m. curfew.

Plaintiffs Frank Duarte and Clarence Naia now go to Leahi Hospital to receive medical care and treatment, but neither has ever been in the cottage. Plaintiff Punikaia has examined the cottage. The cottage is for residential living only. Medical care and treatment for patients are supplied in the Trotter Building, which is also on the Leahi Hospital grounds. The only patients permitted to use the cottage are those who do not

---

[64] Fact Stipulation pp. 8 and 9, and incorporated by reference herein.

[65] Defendant's Exhibit #18 and #31.

[66] Testimony of Dr. Bomgaars.

require more than out-patient medical care. If more than that is required, patients must reside in the Trotter Building. At the patients' cottage, the patients purchase their own food, prepare their own meals, and clean their own rooms. Linen, water, power, general custodial services, etc., are all supplied by the state.

The individual rooms at the cottage are furnished with bed, dresser, lamp, chair, and nightstand. The living room has a sofa, chairs, and a television set. As indicated, the building has been modified to accommodate handicapped persons. The bathrooms have handrails and modified lavatory equipment. There are two wheelchair ramps leading down from the front portion of the building—one leads to a lawn area, and the other to some steps leading up to the nearby street. Automobiles may be driven to where the lawn ramp ends. The interior stairway between the first and second floors has not been modified for wheelchair use.[67]

Since May 1981, the patients' cottage has been used nine times by leprosy patients.[68]

As indicated above, as early as 1969 it was recognized that the Clinton Building, with its 32,000 square feet of floor space, was much larger than was going to be needed to accommodate the 15-20 patients who might normally be expected to be in residence at the facility. A building of 5-8,000 square feet of floor space would be adequate for that patient census. Witness Earl Hunter testified that if the second floor of the Clinton Building were removed entirely and the ground floor demolished so as to leave about 8,000 square feet, and with the termite-eaten beams replaced, the cost of demolishing a portion of the building, together with design and construction costs, termite treatment, and utility connection costs, and inflation escalator of 8%, the present building could be remod-

---

[67] Plaintiffs' Exhibits #17 and 35; Defendant's Exhibit #18; testimony of Dr. Bomgaars.

[68] Testimony of Dr. Bomgaars.

eled for about $142,000. It would then have a life span of between 7 and 12 years. A completely new building of the same size would cost between $230-$310,000. The above figures did not include furnishings. As indicated, it is obvious that the cost of renovating and furnishing the Leahi cottage was minimal compared to the cost estimated by Hunter for rebuilding any portion of the Clinton Building.

THE PRELIMINARY INJUNCTION PROBLEM:

The remand of the Court of Appeals orders this court to "make a new determiation on the issuance of a preliminary injunction". This court has in mind the appellate court's chart of "the correct standard for granting preliminary injunctive relief", viz., "the plaintiffs' burden is satisfied with a demonstration of either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in the plaintiffs' favor", as well as its insistence that the trial judge evaluate not alone the above, but also "(3) comparable hardship to defendant, and (4) effect on public interest".

This court's review of the past record, and contrary to the non-critical inferences made by two appellate panels, shows to this court that a state judge, two United States district judges, and a United States magistrate, each evaluated all of the required factors set forth by the appellate court, and each denied the plaintiffs any preliminary relief. It should appear obvious to anyone who was familiar with the factual background of this case that the plaintiffs' case is entirely without any merit whatsoever, and, as previously indicated, contrary to the inferences of the second appellate panel, even the first appellate panel did not decide that the plaintiffs' case had any merit.

As the preceding detailed facts should clearly have demonstrated, from the beginning the plaintiffs in this case were not permanent residents of Hale Mohalu. The permanent residence and homes of each and every one of the plaintiffs was, and is, at Kalaupapa. Not one came to Hale Mohalu from

Kalaupapa with the intention of making Hale Mohalu his permanent residence. It has been stipulated that the plaintiffs who lived in the Clinton Building after January 26, 1978, other than Punikaia, Duarte, and Naia, lived there "on a part-time basis", and "part-time basis" was stipulated to be defined as

> "patients whose principal place of residence is Kalaupapa Settlement, Molokai, who travel to Honolulu anywhere from two (2) to five (5) times per year, with each visit lasting from a few days to a week at a time, who reside at Hale Mohalu when in Honolulu. Patients who make less frequent trips, or who are living at Hale Mohalu less frequently, are not included."[69]

Each came because medical or other interests brought them from Kalaupapa to Honolulu. For them, Hale Mohalu was but a temporary hostel supplied and furnished by the state for their use while living in Honolulu before returning to their homes in Kalaupapa.

The Stipulation indicates that Punikaia, Naia, and Duarte are the only three plaintiffs now living in the Clinton Building who were there on January 26, 1978. Punikaia had arrived on that day solely for the purpose of protesting the closure of that facility. Of the presently named plaintiffs, only three more were there on January 26, 1978—David Brede, Mary Duarte (since deceased), and Francis Palea. Between January 26, 1978 and September 1, 1978, Bernice and Richard Pupule and Paul Harada had come over from Kalaupapa to Honolulu and moved into the Clinton Building. Neither Brede, nor Palea, nor the Pupules, nor Harada are now living in the Clinton Building. They have all returned to their homes in Kalaupapa. Only Punikaia, Naia, and Duarte remain in residence.

On the evidence, it is manifest that none of the plaintiffs here had any expectations that Hale Mohalu was designed or intended to be their "home". Each had no more than a "unilateral expectation" that whenever they were in Honolulu they would

---

[69] Stipulation 1(b).

be able to live in the Clinton Building while they were temporarily away from their homes in Kalaupapa. At the present time, as stated above, neither Naia, Duarte, or Punikaia intended to give up their homes in Kalaupapa, and Naia and Duarte are going to leave the Clinton Building to return to Kalaupapa "as soon as this case is over". Punikaia comes and goes as is convenient to him. His "cause", now, is to try to keep a transient state-supplied hostel open for him and other patients from Kalaupapa when they are visiting Honolulu.[70]

It appears obvious to this court that the interests of the plaintiffs never did rise even to the level of the plaintiffs in *Moore* v. *Johnson*, 582 F.2d 1228 (9th Circuit 1978), and certainly "failed to rise to the level of a property or 'liberty' interest". Nothing in the acts of the state in closing the Hale Mohalu facility at Pearl City "seriously damaged [the] standing and associations in the community" of any of the plaintiffs. The Clinton Building was not the "community" of any of the plaintiffs. Their community was, and is, in Kalaupapa. Insofar as "community interests" are concerned, the only complaint which any of the plaintiffs has made against moving is that the terrain around the Clinton Building is flatter and therefore easier for them to negotiate, the stores are closer than they are at Leahi, they feel more comfortable when they go in the stores in that area, and the Leahi facility has a more sterile feeling.

This court heard the testimony of Punikaia, Duarte, Naia, and Harada, and observed them physically. While each shows some of the scarring and maiming which formerly accompanied the progress of leprosy, i.e., loss or malformation of fingers and toes, malformation of facial bones, not one is at all grotesque in appearance. Not one would cause even the most sensitive to recoil in horror. Rather, the appearance of each would cause nothing more than a momentary wonderment as to what

---

[70] When at the HSHCC public meeting on November 17, 1977, "Punikaia was asked if the patients would stay at Hale Mohalu even if the building was unsafe. He answered, 'Yes'." Minutes of Meeting.

brought about their physical condition. Nevertheless, all of the above, save Naia, are fully ambulatory. Naia is now using crutches.

Dr. Worth has equated the condition of the plaintiffs with "slavery." This, of course, is a pure emotional reaction not warranted by any objective analysis of their situation. Nothing that the Hawaiian society ever did caused the plaintiffs to be infected with leprosy. These plaintiffs, "old-timers," were forcibly segregated from their family, siblings, and community with two objectives in mind: (1) that society might give to them a home, food, clothing, and medical care for the rest of their lives, and (2) that they would not be able to pass along to their siblings or their fellow citizens the disease of leprosy. Society has always, and still continues to fulfill this obligation. Now drugs have arrested what formerly was an inexorably destructive disease and has rendered those having it non-infectious. Today, if so desired, each and every leprosy patient can leave Kalaupapa or Leahi and return, with no societal restraints, back into their families and the community. The plaintiffs are now receiving more assistance from the people of Hawaii than is given to those suffering, for example, from muscular dystrophy, or cancer, or heart attacks. The cry of the present plaintiffs is that they want more. The present plaintiffs want not only the restoration of "their" hostel at the Pearl City location, they want the use of the entire eleven acres for themselves. They want to be free from any restraints in the way in which they will use the hostel or the eleven acres.

The plaintiffs here, similarly to the plaintiffs in *Moore* v. *Johnson*, apparently believe that the state *must* furnish medical care and hotel facilities *to them at the specific facility of the Clinton Building*. Just as in *Moore* v. *Johnson*, their expectations far exceeded the duties that are imposed upon the state, i.e., the Board of Health, under Chapter 326 of the Revised Laws of Hawaii. Their expectations were, and are, but unilateral expectations, and, "as such, they are not property interests." *Moore* v. *Johnson*.

DUE PROCESS

Even if, in the face of the above analysis, an appellate court should not agree with this court's construction of the facts and applicable law and determines that some of the present plaintiffs did have a "property interest" in remaining in the Clinton Building on January 26, 1978, as shown above, and were therefore entitled to "due process" before they could be moved therefrom at that time,[71] the record indicates that all of the plaintiffs were provided adequate notice, opportunity to be heard, were heard, and were clearly and fully notified of the

---

[71] The January 26, 1978 move is *not* the gravamen of plaintiffs' Amended Complaint. That Complaint specifically addressed itself only to the September 1, 1978 act of the state in cutting off all services to the Clinton Building. It is the plaintiffs' prayers for relief that contain broad sweeping requests for permanent and complete restoration of the Hale Mohalu program at the Pearl City plot, including, of course, the same full medical services now available at Leahi.

Counsel for the plaintiffs have persistently insisted on intermingling the evidence that might be solely relevant to the January 26, 1978 transfer with that of the September 1, 1978 cut-off of services. [Cf. Plaintiffs' Exhibits #37 and 38.] None of the plaintiffs, past or present, ever were transferred! The "cut-off" was seven months *after* what the plaintiffs characterize as a coercive move. [Plaintiffs' Memorandum Re: Remand filed January 18, 1982, p. 10.] Nevertheless, the *Brede* court concerned itself with "transfer trauna".

The *Punikaia* court observed that "the relief expressly sought by the plaintiffs is . . . restoration of minimal services including water, electricity, telephone, the services of one nurse, medical supplies, and limited janitorial services. [Order, p. 2.] That court noted that plaintiffs "characterized the relief sought as an injunction that prohibits the termination of vital services and thus maintains the status quo as it existed prior to the state action." [Ibid.] Just which state action was being referred to by the *Punikaia* court is not clear to this court. The "Order" principally, but not entirely, seems to concern itself with the complaint of the *present* plaintiffs. So does this decision.

proposed state action long before and up to the very day of intended transfer. Contrary to the position taken by plaintiffs' counsel during the hearing, due process does not require that hearings be "conducted in a trial-like atmosphere complete with attorneys to challenge offered evidence and legally trained hearings officers to rule on evidentiary questions."[72]

As set forth in particularly above, as early as 1969 the Citizen's Committee on Leprosy, with now plaintiff Punikaia representing the residents of Kalaupapa, and another leprosy patient, Anita Una, representing the residents of Hale Mohalu, concurring, recommended the closure of the Pearl City facility and the transference of its operations to the vicinity of Leahi Hospital. It has been stipulated that the plaintiffs received advance notice of and attended at least 4 hearings in 1977 before the SHPDA, which hearings were on the evaluation of the planned transfer of the Hale Mohalu program to Leahi Hospital. The SHPDA is an independent agency not a part of the state Department of Health. At some of those hearings, plaintiffs were represented by an attorney. It was only after nine hearings that the SHPDA granted a Certificate of Need authorizing the state to close Hale Mohalu and transfer its operations to Leahi.[73]

The Department of Health also held other informal hearings on the proposed transfer. At the February 7, 1977 hearing at Hale Mohalu, the Department of Health went over its transfer plan with the leprosy patients—Bernard Punikaia was there and commented. On May 4, 1977, a public hearing was held at Leahi Hospital. Again, leprosy patients were present and were given an opportunity to speak on the proposed transfer.[74]

---

[72] Toney v. Reagan, 467 F.2d 955, 958 (9th Circuit 1972), *cert. denied* 409 U.S. 1130 (1973). *See also*, Dixon v. Love, 431 U.S. 105, 115 (1977).

[73] Defendant's Exhibit #10.

[74] Defendant's Exhibit #2.

At the state Certificate of Need Review Panel Meeting of November 8, 1977, on the problem of transfer of facilities, Punikaia and five other patients from Hale Mohalu were present and were heard. At the November 17, 1977 meeting of the HSHCC, as noted heretofore, Punikaia, his attorney, and Representative Abercrombie were present and were heard, just as they were at the Committee's meeting of December 1, 1977.

In December 1977, the Department of Health was faced with the Fire Safety Violation citations issued by the Fire Chief of the City and County of Honolulu.[75] The Clinton Building could no longer be used as a skilled nursing facility, and it was then (and presently is) unsafe for human habitation.

On January 12, 1978, almost every patient then living at Hale Mohalu and Kalaupapa received the Department of Health's notice that the care program would be moved to Leahi "on or about January 23, 1978."[76] As stated above, Punikaia's state court suit for an injunction was immediately filed, thereafter heard, and on January 25, 1978, his prayer for a preliminary injunction was denied.

All of the Hale Mohalu registry patients, i.e., those who had no Kalaupapa homes, moved to Leahi Hospital on January 26, 1978. Only some of the present plaintiffs stayed behind as sit-ins to prevent the Clinton Building from being entirely shut down. As stated above, only six plaintiffs who were in the Clinton Building on January 26, 1978, were still there on September 1, 1978, viz., Punikaia, Naia, Mary and Frank Duarte, David Brede, and Francis Palea. The Pupules and Harada moved into the Clinton Building between January 26 and September 1, 1978.[77] The Board of Health clearly fulfilled any obligation it might have had to the plaintiffs in its efforts to

---

[75] Defendant's Exhibits 5, 6, 8, 9 and 29.

[76] Testimony of Young; Plaintiffs' Exhibits 11, 13, and 14.

[77] Brede and Palea have since moved out, and Mary Duarte, a plaintiff in *Brede* and *Punikaia*, is deceased.

involve them in the entire problem of the Hale Mohalu program and the transfer of that program to Leahi. The state gave *all* leprosy patients more than adequate advance notice of its proposed actions.

As this court views the facts and the law, the plaintiffs have no possible chance of success. Even if a shadow of possible success remained in this case, the only hardships of which the plaintiffs can now complain are that Leahi will not give them the same freedoms to use the facilities as *they* want to, e.g., visitors, pets, children, parties; that it is somewhat more difficult for them to go from the Leahi facility to shops; and that they believe that they will not find the same friendliness on the part of the shopkeepers in the Kaimuki (Leahi) area as they are now accustomed to in the Pearl City area. As is obvious, these "hardships" are minimal. If forced to rebuild or remodel the Pearl City facility as an 8,000 square-foot unit and furnish it, as now requested by the plaintiffs, its minimal cost would be between $140-$200,000. To staff and service it as requested would call for a budget of about $120-$130,000 per year for water, utilities, nursing and custodial expenses, plus more for medical supplies and services.[78] The state would still be compelled to maintain the Leahi facility to take care of non-Kalaupapa registered patients and to furnish them the necessarily much higher degree of medical care they require than could be provided at the "new" Pearl City hostelry.

To be sure, the state's hardships can be said to be only financial, but those financial hardships fall upon every inhabitant of the state. The position of the plaintiffs is grossly unreasonable. The plaintiffs here are suffering no "irreparable injury." Each and all have used and intend to use the Pearl City facility as their Honolulu motel. The new cottage at Leahi gives them everything that they ever have had in the Clinton Building, except flatter lands, closer stores, and the present absolute freedom of action now enjoyed by the completely

---

[78] Stipulation, 3c(2), p. 5.

unrestricted use of the Clinton Building and surrounding grounds.

The public interest on the part of the handful of supporters of those still living in the Clinton Building is that engendered by the emotional response to the "poor, unfortunate victims of leprosy." They completely ignore the general public's interest in the reasonable and necessary use of the state's tax dollars. As was evidenced by the record of the public hearings on the subject of transfer, and the evidence on the record, the leprosy patients from Kalaupapa will be given more than adequate care and services at Leahi. The eleven acres at the Pearl City facility are no longer needed as a garden, horse pasture, or playground for the 15 or so patients who intermittently come to Honolulu from their homes at Kalaupapa. The plaintiffs' prayer for a Preliminary Restraining Order must be, and is, DENIED.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT:

On November 30, 1981, plaintiffs moved for "partial summary judgment as to defendant's liability on those claims [in Plaintiffs' Amended Complaint] which alleged denial of due process," together with a memorandum in support of a motion. Defendant, on December 11, 1981, filed a Memorandum in Opposition to that Motion. Because it feels that the evidence and record are complete enough, this court chooses to rule thereon, without argument.

Plaintiffs maintain they have "not one but many legal entitlements amounting to property interests and therefore are entitled to due process before any of those property interests could be altered, reduced or terminated." Plaintiffs maintain that

> . . . the only relevant facts are those concerning the manner in which defendants perpetrated a non-judicially sanctioned, life-threatening and unilateral shutdown of Hale Mohalu and the fact that no judicial process (including no witnesses under oath, no power to compel attendance of

witnesses, no cross-examination, etc.) was ever afforded plaintiffs. These facts are uncontroverted.

It is clear from this court's preceding analysis of the facts that plaintiffs' statement that "these facts are uncontroverted" is unsupportable. Plaintiffs' first argument is that their claim of entitlement was more than a unilateral expectancy because Hawaiian Revised Statutes Sections 326-11 and 326-2[79] mandated the maintenance of Hale Mohalu in the Clinton Building as long as Kalaupapa was in existence. H.R.S. § 326-40 expressly states that it is "the policy of the state that any patient a resident of Kalaupapa desiring to remain at the Settlement shall be permited to do so for as long as he may choose, regardless of whether or not he has been successfully treated" (Act of 1977). Although the plan to move the Hale Mohalu program from the Clinton Building to Leahi had been before the Legislature since 1969 and, as indicated above, Representative Abercrombie had been at several of the public hearings on the subject in 1977, the Legislature did not give the same lifetime entitlement to those in the Hale Mohalu program that they gave to those who wished to maintain their home in Kalaupapa.

---

[79] H.R.S. § 326-11 provides:

> Voluntary transfer to and from Kalaupapa. Any person undergoing treatment and receiving care for leprosy at Hale Mohalu on [June 30, 1969] may be transferred to Kalaupapa Settlement for care and treatment if he desires. Any person who may undergo treatment and receive care for leprosy at Hale Mohalu after [June 30, 1969] may apply to the director of health for transfer to Kalaupapa Settlement.
>
> Any person undergoing treatment and receiving care for leprosy at Kalaupapa Settlement may be transferred to Hale Mohalu for care and treatment if he desires. A person transferred may be retransferred to Kalaupapa Settlement if he desires.

H.R.S. § 326-2 states:

> Every leprosy patient at Hale Mohalu and Kalaupapa shall be accorded as nearly equal care and privileges as is practicable under the different operating conditions of the two institutions.

This same claim of the plaintiffs was before the Circuit Court of Hawaii in the case of *Bernard K. Punikaia, et al.* v. *Yuen, Director of the Department of Health, State of Hawaii*, filed on January 20, 1978—six days *before* the state made the transfer of Hale Mohalu patients to Leahi. At the time of filing the suit, the circuit court granted a Temporary Restraining Order prohibiting the proposed transfer. The plaintiffs' Motion for a Preliminary Injunction was heard on January 25, 1978 before State Circuit Judge Shintaku, who then held—the day before the transfer took place—that plaintiffs failed to show a likelihood of success on the merits. The judge held specifically that H.R.S. § 326-11 related to transfers between Hale Mohalu and Kalaupapa Settlement only, and "clearly is not applicable to questions relating to transfers to Leahi Hospital." That court continued, "Section 326-3, Hawaii Revised Statutes, overrides other laws (including rules and regulations) and authorizes the Department of Health to make arrangements at Leahi Hospital for the care and treatment of any person within the state affected with leprosy." Judge Shintaku than ordered the Temporary Restraining Order dissolved and denied plaintiffs' Motion for a Preliminary Injunction.

Nevertheless, the same issue came up again before United States District Judge Wong in *Brede, supra*, who granted defendant's Motion to Dismiss and denied Plaintiffs' Motion for a Preliminary Injunction on September 21, 1978. On the claim of plaintiffs' entitlement because of the basis upon which the state acquired the property from the federal government, Judge Wong stated:

> There is no question in this case but that Plaintiffs have no standing to assert that the State has breached the conditions of the Quitclaim Deed. First, Plaintiffs were not parties to the Quitclaim Deed. Second, the State has acquired the unconditional fee interest in Hale Mohalu.
>
> Thus, Plaintiffs lack standing to claim that the State has breached its contract with the Federal Government.

On appeal, the *Brede* court affirmed Judge Wong in this respect in stating, "On appeal, appellants raise a number of

issues, most of which are without substantial merit." This claim was one of those issues so dismissed.[80]

Section 326-3 was passed in 1949 following an address by the then Governor Stainback to a joint session of the House and Senate in which the Governor called the legislators' attention to the efficacy of modern drugs in treating the disease with the result that leprosy was no longer a highly contagious disease. At that time, the Kalihi facility was still being used for the care and treatment of leprosy patients. It was in 1949 that Hawaii acquired the Pearl City site from the U.S. Government for the Hale Mohalu program. Section 326-3 was passed for the specific purpose of enabling the Department of Health to treat anyone with leprosy in *any* "hospital, nursing home, or convalescent home in the state, either public or private." Thus, the Department of Health could care for leprosy patients in Kalihi, Pearl City, or anywhere else in the state as the Department of Health might deem best. Thus, § 326-3 did not reaffirm and make even more clearly manifest the power given to the Department of Health under § 326-1 to "establish hospitals, settlements, and places as it deems necessary for the care and treatment of persons affected with leprosy," subject only to the approval of the governor. There is nothing in the language of the statute, and there is nothing to be found in the legislative history which even inferentially inhibits the Department of Health from moving the Hale Mohalu care program to any other site.

Plaintiffs also urge that § 27-6 of the Public Health Regulations[81] give to leprosy patients an entitlement not to be

---

[80] *Brede, supra*, p. 410.

[81] Public Health Regulation § 27-6 states:

> The transfer of a patient from any hospital for the care and treatment of leprosy to any other hospital for the further care and treatment of leprosy or any other medical or surgical condition may be made upon recommendation of the attending physician and with the consent of the patient. If a medical or surgical emergency arises and the patient is incapable of being consulted, such transfer may be made without his consent.

removed from Hale Mohalu without their consent. Regulation 27-6 has never applied to the Hale Mohalu program, inasmuch as the Clinton Building was never a hospital within the definition of Regulation 27-6. The Clinton Building was always used only as a skilled nursing facility. The plaintiffs here gain no entitlement thereunder. Such claim is without merit.

Even if the term "hospital" were arbitrarily broadened to include a skilled nursing facility, it would not assist the present plaintiffs. None of them is now suffering from active leprosy, and none has any medical or surgical condition of the type that demands "an attending physician." Thus, the section could have no application to them. The state here did not attempt to move any of the plaintiffs for any medical or surgical reason.

Plaintiffs next ground for their Motion is based upon the claim of the "life-endangering effects of transfer." This "phenomemon" has been fully discussed, supra. This claim is without merit.[82]

The plaintiffs' next ground is that the plaintiffs have property rights as third-party beneficiaries to the deed from the United States to Hawaii of the buildings and eleven acres at the Pearl City facility. This same argument was made before the *Brede* court, which court, without mentioning it, rejected it among plaintiffs' grounds which were "without substantial merit."[83] The *Brede* court recognized that Hawaii held the property "in fee simple absolute."[84]

Plaintiffs' next ground is that the state's custom of providing continuous care and treatment at Hale Mohalu created more than a unilateral expectation on the part of the plaintiffs to remain there. Although the plaintiffs' brief would lead one to believe that these present plaintiffs have, for 30 years, had

---

[82] O'Bannon v. Town Court Nursing Center, 447 U.S. 773.

[83] Brede, *supra*, 616 F.2d at 410..

[84] *Ibid.*

continued residency and treatment at Hale Mohalu, as the facts heretofore set forth below show, not one of the plaintiffs has had any "continuous" residency or treatment for 30 or any other years at Hale Mohalu. As heretofore set forth, only of Duarte, Naia, and Punikaia can it be construed that they have remained in "continuous" residency, and that alleged continuity has been covered above. All other plaintiffs are but part-timers. To reiterate, the continuous residency and treatment of the plaintiffs has been, and still is, at Kalaupapa. Thus, factually alone, this argument is without merit. Even presupposing that there had been 30 years intermittent but regular use of the Hale Mohalu program by the plaintiffs, the Court, in *Connecticut Board of Pardons* v. *Dumschat*, ___ U.S. ___, 49 U.S.L.W. 4711 (1981) and *Jago* v. *Von Curen*, ___ U.S. ___, 50 U.S.L.W. 3370 (1981) has held that the regularity of performance alone is insufficient to create liberty interests. Certainly in this case there was no mutually explicit understanding that the plaintiffs would be entitled to the use of the Clinton Building and the eleven acres around it forever and ever.[85]

In their Motion, plaintiffs have devoted three pages in painting a picture which would have the state *responsible* for the patients' "developing an extreme psychological dependence on the comfortable and private living environment" of Hale Mohalu. The inference is that the state somehow, having "saved the life of one drowning," is compelled thereafter to support that person in any manner he might desire. The argument admits that the state has done everything possible to ameliorate the physical handicaps of those afflicted with leprosy. When leprosy no longer became incurable but could be arrested and its possible infection of others stopped, the state offered to every patient an opportunity to live at Kalupapa for the rest of the patient's life with homes, food, clothing, and medical care supplied free-of-charge. The state also offered to assist leprosy

---

[85] *Cf.*, Perry v. Sinderman, 408 U.S. 593 (1972).

patients with food, clothing, and medical care wherever they wished to live in the community. As is indicated by the activities of Bernard Punikaia, no longer are "lepers" "ostracized." Punikaia even attended Leeward College in Hawaii for some two semesters. The leprosy patients appeared at many of the public meetings, at Leahi, in the Board of Health headquarters, and at Hale Mohalu. There was no ostracization. The psychological impact urged by the plaintiffs in their brief simply was but verbal.

Plaintiffs' next basis for partial summary judgment is that this "termination of public utilities, particularly where such action may imperil the lives of such users, may not occur without prior judicial approval afforded after hearing." The plaintiffs here are apparently referring to the action of the state in cutting off food and medical supplies, as well as the water, light, and telephone connections to the Clinton Building on September 1, 1978. From January 26, 1978, when all leprosy patients in the Clinton Building, save those who refused to leave Hale Mohalu, were transferred to Leahi, until September 1, the state continued to supply those services and facilities to the Clinton Building. The state was thus obviously assisting and abetting those plaintiffs then living there to continue to live in a state buiding which the state knew was then unsafe for human habitation (and now is even more unsafe). As indicated above, on September 1 there were nine leprosy patients living at Hale Mohalu. Three of those had come into the facility *after* January 26, 1978. Not one of them had any "right or entitlement" to continue the occupancy of the premises, nor to free food, medicine, water, electricity, and telephone services at that location. Each had been given full notice of the fact that the services would be cut off on September 1, 1978. Each was given full opportunity to move to Leahi or to return to Kalaupapa. Each deliberately refused to do either. None, under the circumstances, had any entitlement to or an expectation of an obligation on the part of the state to continue to give them free food, medicine, and utilities in the Clinton Building.

Plaintiffs were not lessees, as considered in *Kaufman* v. *Abramson*, 363 F.2d 865 (1966). Their posture at that time was

nothing more than that of sit-in trespassers on state property. Plaintiffs' situation was in nowise akin to that of *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). There was no Hawaiian statute mandating that the Board of Health could not cut off utilities to the Clinton Building other than for good and sufficient cause. Thus, there was no " 'legitimate claim of entitlement' within the protection of the due process clause."[86]

Plaintiffs next maintain that the plaintiffs had entitlements under the state's Landlord/Tenant and Public Housing statutes. As indicated above, on September 1 plaintiffs were not tenants in the contractual sense, with the state as the landlord. The only contract between the state and leprosy patients is that the state will, at all times, give leprosy patients a free home and care at Kalaupapa, and medical services for life. Only at Kalaupapa could they possibly be held to have a contractual relationship with the state.

Hale Mahalu was never a "public housing" facility. On September 1, the state owed no obligation to the sit-in trespassers to supply them with anything at the Clinton Building. The state fulfilled all of its obligations to the patients when they offered them housing care, and medical attention at Leahi or Kalaupapa.

Plaintiffs again would infer that the leprosy patients "have been forced to live on government property for most of their lives." This is not a valid statement of the facts. The only period upon which they were "forced to live on government property" was that period before the discovery of drugs that would arrest the spread of leprosy. After that time, leprosy patients could and can live anywhere they want to. Today, the vast majority of all leprosy patients in Hawaii live away from either Kalaupapa or the Clinton Building, or Leahi.

Plaintiffs never did enjoy a landlord/tenant relationship with the state, nor were they public housing tenants. The argument

---

[86] *Memphis*, *supra*, at pp. 11 and 12.

of plaintiffs that they have entitlement under H.R.S. Chapter 360 "provisions applicable to public housing" or the Hawaii Landlord/tenant Law, H.R.S. Chapter 666, is without merit.

Plaintiffs next claim that 42 U.S.C. § 247e, which provides federal benefits for all leprosy victims, is a property interest from which the state cannot deprive them without due process. The relevant portion of § 247e provides:

> The [Public Health] Service shall, in accordance with regulations, receive into any hospital of the Service suitable for his accommodation any person afflicted with leprosy who presents himself for care, detention, or treatment. . . .

It is apparent on the face of the above section that there is nothing in its language to give to the plaintiffs the liberty or property interests which they claim. Nothing therein sets forth any substantive limitation on the discretion of those administering public health service for leprosy patients in their determination of which facilities such patients will be accommodated. Other than using such terms as, "Leahi Hospital is 'like a prison, " or "the rooms are smaller than the ones in the Clinton Building," or that they are subject to rules and regulations different from those they themselves have now set up at the Clinton Building, and that their access to retail facilities and services and outdoor activities are made more difficult at the Leahi site, plaintiffs have not, and cannot, point to any deficiency in the accommodations offered at Leahi to leprosy patients.

Plaintiffs argue that the plaintiffs have a "legitimate entitlement to *continued* receipt of unaltered benefits." No case supports such conclusion. *Moore* v. *Johnson*, *supra*, is to the contrary, and that court said,

> "The burden imposed upon the patients [in the Veterans Hospital] by the withdrawal or modification of benefits is not unusual. Similar burdens always attend an extensive distribution of benefits by the government; inescapably few get exactly what they want, while most, it is usually assumed, get more than they would have otherwise. All would get less if invariably the complaints of the many

> required elaborate hearings with all the trappings which only the lawyers and judges can fully appreciate."[87]

Plaintiffs' subjective claims of unsuitability here create no liberty or property interests.

Plaintiffs next maintain that H.R.S. § 326-1 gives the plaintiffs a "legitimate entitlement to medical care at a suitable facility." All that the *Brede* court said on this was that "the state has statutorily conferred upon leprosy patients an entitlement to treatment at *some* state leprosorium" [emphasis added]. That statement does not, in any way, erode the correctness of Judge Dick Yin Wong's holding in the district court hearing in 1978 that the Hawaii Revised Statutes do not negate the authority of the Department of Health to close Hale Mohalu and transfer its program to Leahi Hospital. In line with this court's prior discussion on H.R.S. § 326-1 and accompanying sections, plaintiffs' claims to the contrary are without merit.

In filing its Motion for Partial Summary Judgment, plaintiffs maintained that "there are no material facts in dispute with regard to these claims. Defendant's liability is established as a matter of law." As this court's above rulings on plaintiffs' claims indicate this court agrees that on the issue of the state's possible liability, there are no material facts in dispute. On none of the grounds stated have the plaintiffs shown that they have no standing. There is not one instance in which plaintiffs have been able to show that the state has violated any constitutionally protected liberty or property interests by its action in turning off the public utilities at the Clinton Building on September 1, 1978. They have shown no "legitimate claim to entitlement" as required by the *Board of Regents* v. *Roth*, 408

---

[87] Moore v. Johnson, *supra*, p. 1234. In the same tenor are walker v. Hughes, 558 F.2d 1247, 1252, 1253 (6th Circuit, 1977); McDonnell v. United States Atty. Gen., 420 F.Supp 217 (E.D. Ill. 1976); Moody v. Daggett, 429 U.S. 78, 88, n. 9 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Howe v. Smith, ___ U.S. ___, 49 U.S.L.W. 4715 (1981).

U.S. 564 (1972). The most that they have shown is a unilateral expectation that the Board of Health is under a legal duty to supply these Kalaupapa residents with care and medical facilities in the structurally unsafe, termite-ridden and run-down Clinton Building, together with exclusive use of the eleven acres surrounding it, under rules of their own making whenever they happen to be in Honolulu. As stated above, on September 1, 1978 the state did not owe to any of the sit-ins an obligation to supply them with services in the Clinton Building. They had no legal right to be where they were, let alone a legal right to force the state to keep supplying them free food, medical supplies, water, electricity, and telephone services at that building.

At no time did the state take any move—neither to transfer the program to Leahi, nor to cut off public utility services—without giving notice after notice after notice to the plaintiffs and all other Kalaupapa and Hale Mohalu registered patients of what the state was planning, how it would affect each and all leprosy patients, and the necessity for the proposed act. If the plaintiffs here had ever had any constitutional entitlement, the state had given to them all due process required before the state acted.

As heretofore noted, before ever the January 26, 1978 transfer of patients took place, the chief activist in this litigation, Bernard Punikaia, took legal action in an attempt to stop the proposed transfer. He and those other patients whom he then represented had a full hearing on his petition for a preliminary injunction. This was denied by the state trial judge.

Plaintiffs' Motion for Partial Summary Judgment is DENIED.

JUDGMENT:

This case has now been before four judges: one state and three United States district judges and a United States magistrate. Subsequent to the transfer, first Judge Wong found that the plaintiffs' claims were without merit. Three judges on the

Court of Appeals were unsure on the record of the correctness of that conclusion, and remanded it to this court to ascertain whether the plaintiffs had any entitlement. The matter was referred by Chief Judge King to the magistrate, who held a full hearing on the subject and whose findings of fact were, in fact, even if not by name, adopted by Judge King. Judge King, too, found that plaintiffs' claims, even as amended, were without merit. Again, another panel of the Court of Appeals failed to find, on the record, just what facts were evaluated by Judge King before he dismissed the complaint, and sent the case back for the second time for specific findings to the appellate court's specific questions.

This judge now has held hearings for five days, and at the end of the hearings this judge was even more convinced, if that were possible, than was state Judge Shintaku, United States District Judge Wong, Judge King, and Magistrate Young, that plaintiffs' claims were, and are, entirely without merit.

Plaintiffs have had very experienced and excellent legal representation. Their counsel have brought in every conceivable basis in order to establish some liberty or property interest that the plaintiffs might have in their continued use and occupancy of the Clinton Building. The state also has had excellent counsel. The efforts of counsel for both plaintiffs and defendants have produced an enormous quantity of typewritten material. The discovery and motion papers and other memoranda and documents in this case now occupy approximately two feet of filing space—this is exclusive of material presented to the Court of Appeals. The court believes all legal efforts should cease.

This judge feels that plaintiffs' suit should be concluded here and now. As seen above, plaintiffs filed a motion for partial summary judgment on the issue of their entitlement to due process. It is unnecessary for this court to wait for defendant to bring a cross-motion, particularly where, as here, the record is

exhaustively complete.[88] Therefore, based on the entire record and testimony that has come before this court, this court finds that, as a matter of law, plaintiffs have no standing, were not entitled to due process, and, if they were entitled to due process, the process accorded them was legally adequate. This court, sua sponte, under R. Civ. P. 56, orders that JUDGMENT BE ENTERED FOR THE DEFENDANT.[89]

DATED: Honolulu, Hawaii, March 5, 1982.

MARTIN PENCE

UNITED STATES
DISTRICT JUDGE

---

[88] Factora v. District Director of the United States Immigration & Naturalization Serv., 292 F.Supp. 518, 521 (C.D. Cal. 1968); Wright & Miller, Federal Practice and Procedure: Civil § 2720.

[89] Wright & Miller, Federal Practice and Procedure: Civil § 2720.

APPENDIX B

JUDGEMENT ON DECISION BY THE COURT
FOR THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CIVIL ACTION DOCKET NO. 78-0336

DAVID BREDE, et al.,

Plaintiffs,

vs.

GEORGE A. L. YUEN,

Defendant.

JUDGMENT
(On Decision of Remand, and Decision on Summary Judgment)

This action came on for evidentiary (hearing) before the court, United States District Judge Martin Pence presiding. The issues having been duly (heard) and a decision having been duly rendered, **it is ordered and adjudged** . . . that judgment be entered in favor of defendant and against plaintiffs.

FILED IN THE
United States District Court
District of Hawaii
MAR 29 1982
WALTER A.Y.H. CHINN, CLERK

cc: Mr. Robert M. Harris
Mr. Sidney Wolinsky
Mr. Phillip Moon

Dated at: Honolulu, Hawaii

Date: March 29, 1982
WALTER A.Y.H. CHINN, Clerk

Chief Deputy *Clerk of the Court*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 78-0336

DAVID BREDE, *et al.*,

Plaintiffs,

vs.

DIRECTOR FOR THE DEPARTMENT OF HEALTH FOR THE STATE OF HAWAII, et al.,

Defendants.

MEMORANDUM AND ORDER

RONALD Y. AMEMIYA
Attorney General
State of Hawaii

MICHAEL A. LILLY
MELVYN M. MIYAGI
Deputy Attorneys General
State Capitol
415 S. Beretania Street
Honolulu, Hawaii 96813
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 78-0336

DAVID BREDE, *et al.*,

Plaintiffs,

vs.

DIRECTOR FOR THE DEPARTMENT OF HEALTH FOR THE STATE OF HAWAII, et al.,

Defendants.

MEMORANDUM AND ORDER

On September 19, 1978, a hearing was held on the above-entitled cause regarding the Defendants' Motion to Dismiss the Verified Complaint and the Plaintiffs' Motion for Preliminary Injunction. For the reasons herein, the Court grants the Motion to Dismiss and denies the Motion for Preliminary Injunction.

The undisputed facts are that the State of Hawaii acquired title to a parcel of land known as Hale Mohalu at Pearl City, from the Federal Government pursuant to a Quitclaim Deed executed on March 23, 1956. Said Deed contained conditions which, *inter alia,* required the State of Hawaii to use Hale Mohalu as a public health facility for 20 years, reserving unto the Federal Government the right of re-entry for any breach of the conditions within the 21st year. The Federal Government did not exercise this right and thus, as of March 23, 1977, the State of Hawaii obtained unconditional fee simple title to Hale Mohalu.

The Department of Health, State of Hawaii, has determined to close the leprosy treatment program at Hale Mohalu be-

cuase it was in violation of life safety codes and transfer the same to Leahi Hospital in Honolulu.

This Court takes judicial notice that certain residents of Hale Mohalu filed a class action on January 20, 1978, in the Circuit Court of the First Circuit, State of Hawaii, which sought to enjoin the closing. *Punikaia* v. *Yuen*, Civ. No. 53577 (1st Cir. Haw.). In its February 21, 1978 Order Denying Plaintiffs' Motion for Preliminary Injunction, the Circuit Court basically held that the Hawaii Revised Statutes do not proscribe the authority of the Department of Health to close Hale Mohalu and transfer its program to Leahi Hospital.

On January 26, 1978, Hale Mohalu was officially closed and certain of the residents moved to Leahi Hospital. However, Plaintiffs, who are residents of Kalaupapa, have since moved into Hale Mohalu. In an effort to move Plaintiffs, the Department of Health terminated all medical, utility, and other services to Hale Mohalu on September 1, 1978.

On September 5, 1978, Plaintiffs filed this action and obtained a temporary restraining order requiring Defendants to "restore all electrical power, water, food and telephone service to Hale Mohalu. . . ."

Plaintiffs' Verified Complaint alleges three causes of action. First, they claim that they have a right to constitutional due process, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, prior to any contemplated termination of utility and other services. Second, they claim that the termination of services and forcing them to obtain them at Leahi Hospital constitutes slavery, in violation of the Thirteenth Amendment. Finally, they claim that the Defendants breached their contractual agreement with the Federal Government, as embodied in the Quitclaim Deed.

DUE PROCESS

Whether and to what extent constitutional process may be due to Plaintiffs prior to their transfer from one medical facility to another or prior to termination of utility or other services

depends upon whether they have some "state law or practice conditioning such transfers [or termination of services] on proof of serious misconduct or the occurrence of other events." *Meachum* v. *Fano*, 427 U.S. 215, 216 (1976). Nothing in Hawaii law conditions the power of the Department of Health to close Hale Mohalu and/or transfer its patients to Leahi Hospital.

Plaintiffs rely upon Hawaii Revised Statutes § 326-11, which states that a Kalaupapa resident "*may* be transferred to Hale Mohalu for care and treatment if he desires." However, that section is overruled and superceded by § 326-3 which states that "*[n]otwithstanding any of the provisions of this chapter or of any other chapter relating to this subject matter*, the department of health may make arrangements for the care and treatment of any person within the jurisdiction at any hospital, nursing home, or convalescent home in the State. . . ." Section 326-3 therefore confers unlimited discretion on the Department of Health to make arrangements for the "care and treatment" of persons afflicted with leprosy, "[n]otwithstanding" § 326-11. This was the precise conclusion of the Hawaii Circuit Court in *Punikaia* v. *Yuen*, *supra*, in its denial of preliminary injunctive relief.

The pertinent Hawaii laws do not contain standards governing the Department of Health's exercise of discretion in the care and treatment of persons afflicted with leprosy. Therefore, since the closing of Hale Mohalu "did not implicate a constitutionally-protected 'liberty interest,' due process did not attach." *Wakinekona* v. *Olim*, ____ F.Supp. ____ (D. Haw. June 8, 1978), slip op., at 5.

Plaintiffs also claim that the State's receipt of federal funds for its leprosy treatment program triggers due process. However, the Defendants' discretion to administer those funds as they see fit precludes the implication of a constitutionally-protected liberty interest in having those funds expended at Hale Mohalu instead of Leahi Hospital.

SLAVERY

Since Plaintiffs are free to leave Hale Mohalu and enter or not enter Leahi Hospital, at their will, they have not stated a claim under the Thirteenth Amendment.

BREACH OF CONTRACT

In order to have standing to sue, a "plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Thus, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*, at 499.

There is no question in this case but that Plaintiffs have no standing to assert that the State has breached the conditions of the Quitclaim Deed. First, Plaintiffs were not parties to the Quitclaim Deed. Second, the State has acquired the unconditional fee interest in Hale Mohalu.

Thus, Plaintiffs lack standing to claim that the State has breached its contract with the Federal Government.

In determining the propriety of preliminary injunctive relief, this Court is guided by the language in *Aguirre* v. *Chula Vista Sanitary Service*, 542 F.2d 779, 781 (9th Cir. 1976) wherein the Court held the following:

> "[A] preliminary injunction should issue '. . . upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief. . . ."

In light of *Aguirre*, this Court denies Plaintiffs' Motion for Preliminary Injunction. There is no likelihood—serious or otherwise—of Plaintiffs prevailing on the merits. The fact that Plaintiffs may move to Leahi Hospital shows that they will not suffer legally-cognizable irreparable injury.

The Plaintiffs' Motion for Preliminary Injunction is, accordingly, denied and Defendants' Motion to Dismiss is GRANTED.

DATED: Honolulu, Hawaii. SEP 21 1978.

DICK YIN WONG
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

JOHN F. SCHWEIGERT
JOHN F. SCHWEIGERT

Attorney for Plaintiffs

No. 83-1481

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, et al.,
Petitioners,

vs.

CHARLES CLARK, Director of the
Department of Health for the State of Hawaii,
Individually and in his Official Capacity,
Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF OF RESPONDENT

SIDNEY M. WOLINSKY
COUNSEL OF RECORD
ANITA P. ARRIOLA
Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

ROBERT M. HARRIS
HARRIS & SMITH
201 Model Progress Building
1188 Fort Street Mall
Honolulu, Hawaii 96813
(808) 537-5502
Counsel for Petitioners

June 21, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

No. 83-1481

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, et al.,
Petitioners,

VS.

CHARLES CLARK, Director of the
Department of Health for the State of Hawaii,
Individually and in his Official Capacity,
Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF OF RESPONDENT

INTRODUCTION

Respondent's Brief in Opposition (hereinafter "Brief of Respondent") highlights the necessity for this Court to determine the crucial matters here presented. That Brief and the conflicting lower court decisions in this case[1] reflect an absence of consensus which can only be resolved by this Court on each of the following questions:

1. Does *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) distinguish between direct and indirect government action in triggering due process rights?

Or, as Respondents assert, does the *O'Bannon* reasoning apply because "no constitutional distinction can be made between indirect and direct termination" (Brief of Respondent at 8)?

2. Has this Court decided, as Respondent claims (and as the Ninth Circuit held), that "transfer trauma" can never call the due process clause into operation?

Or is it the case, as the first panel of the Ninth Circuit ruled, "[t]o the extent . . . that transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients, relocation may constitute deprivation cognizable under the due process clause" (App. at A-93)?

3. If state law does not explicitly limit the discretion of a state bureaucracy, may that bureaucracy use life-threatening force against those entrusted to its care with or without regard to federal due process?

4. Is closing a government facility with patients still there a "mere transfer" not involving any reduction of benefits?

Or does the fact that "[t]he state has statutorily conferred upon leprosy patients an entitlement to treat-

---

[1]The Ninth Circuit's decision is also inconsistent with those of other circuits, which are cited in the Petition for Writ of Certiorari at 11, n.8.

ment . . ." (App. at A-7) and the fact that a facility has been used for Hansen's Disease patients for 30 years a sufficient interest to require due process?

Litigants and courts are hard pressed to know even whether evidence can be adduced on these questions. In essence, Petitioners and Respondent disagree about the extreme principles of law enunciated by the Ninth Circuit below, and the parties vigorously disagree about whether those holdings were mandated by this Court's ruling in *O'Bannon*.

Respondent does not dispute that *O'Bannon* formed the basis of the Ninth Circuit ruling that a government bureaucracy need not accord due process when terminating life supporting services to a nursing home while the residents are still living there. Respondent also does not dispute that its infliction of life-threatening force in this case against Petitioners was without any judicial proceedings.

Instead, Respondent argues that this Court's opinion in *O'Bannon* affirmatively sanctions the direct termination of benefits by a state agency without due process, even though both the majority opinion of Justice Stevens, the concurring opinion of Justice Blackmun, and the dissent of Justice Brennan rejected that proposition.

The issue of whether the due process clause protects elderly residents of a state-run facility when the state acts directly against them will affect tens of thousands of residents of such institutions. Should this Court grant the Petition, it will have the opportunity to consider the very different arguments which apply when the state directly coerces residents than those which apply in an indirect decertification, as well as to clarify *O'Bannon*.

STATEMENT OF THE CASE

Respondents imply that every lower court has ruled that Hawaiian law gives unfettered discretion to a state bureaucracy to move Hansen's Disease patients at will. Brief of Respondent at 10. This statement is misleading as well as

irrelevant. There have been at least three different results in this case before each of the three different panels of the Ninth Circuit. These varied results reflect the confusion in the lower courts concerning the issues raised by this Petition. The first panel, considering the dismissal of the complaint, found that either the fact that the state had statutorily conferred upon leprosy patients an entitlement to treatment or that transfer trauma could result from the state's decision to relocate patients might constitute a deprivation within the due process clause. App. at A-7-A-9. That panel remanded the case.

A second panel considered the denial by the District Court of Petitioners' Motion for Preliminary Relief, reiterated the holding of the first panel and remanded again. App. at A-29. Upon remand, the District Court on its own motion entered summary judgment in favor of the state. The "five-day hearing" (Brief of Respondent at 3) was not on the merits but was a hearing on the motion for preliminary injunction. Only the third and different panel of the Ninth Circuit found that dismissal was proper.

STATEMENT OF THE FACTS

The Brief of Respondent has omitted several admitted matters of importance, each of which makes the decision of the circuit court below one of serious legal and practical significance.

First, Respondent fails to distinguish between transfer trauma (the phenomena of higher mortality and morbidity rates resulting even from the careful movement of elderly men and women), and infliction of life-threatening force against such aged persons.

Secondly, Respondent refuses to differentiate between a true "transfer" (patients are moved first, and subsequently the facility is closed) and the self-help closure which took place in this case when all life support service was removed from the facility while the patients were still in it.

Finally, Respondent does not mention that the "deterioration" of Petitioners' home took place under the management of Respondent while Respondent was under a contractual obligation of maintenance to the federal government (RT 531:12-540:8).

Respondent also purports to set forth how much is done for Hansen's Disease victims by the State of Hawaii, which he believes justifies the view that these patients are undeserving of legal protection. Brief of Respondent at 3-6. These "facts" are in dispute as well as irrelevant to infringements on the constitutional rights of Petitioners. The brief does not mention that the state of Hawaii receives in excess of $1.8 million annually from the federal government to provide care for Hansen's Disease victims (RT 320:2-22).

The tactics used against these leprosy victims represent a growing problem in Hawaii. There have been a number of incidents in that state in which state bureaucracies, without judicial procedures, took the law into their own hands, and brought in their own bulldozers and armed criminal law enforcement personnel in unannounced coercive moves against its own citizens. Such maneuvers include those at Sand Island, Niumaula, Heeiakea and Makua Valley and Makua Beach. In the absence of legal restraint, there is a tendency for such non-judicially sanctioned self-help tactics to become the standard operating procedure for several Hawaii bureaucracies attempting to effectuate their decisions.

ARGUMENT

A. The Practical Impact of the Decision Below Allows Unprecedented Discretion to State Agencies at the Cost of Undermining Long Established Constitutional Safeguards for Persons Living in State-Run Institutions

Respondent does not dispute (as indeed he could not) that the total denial of food, water, light, heat, refrigeration (for patients requiring daily insulin), medicine and a

telephone, while elderly and disabled people were still inside the facility, placed the lives of the Petitioners in extreme danger. Respondent admits that he failed to seek any eviction proceeding, even though such a summary judicial procedure was easily available under Hawaii law. Respondent also does not dispute that the existence of transfer trauma to these already psychologically damaged men and women would have presented a serious factual question if Petitioners had ever been given an opportunity to present evidence. Respondent's position is that even overwhelming proof of serious psychological damage to the Petitioners because of their move would involve no due process considerations.

In short, Respondent's argument, reflected in the decision of the Ninth Circuit, is that *O'Bannon* justifies the use of such life threatening force by a government bureaucracy against citizens entrusted to its care.

Grant of this petition will give this Court an opportunity to resolve conflicting viewpoints in the lower courts on several important constitutional issues. For example, can a government agency use life-threatening force in a non-emergency situation against those entrusted to its care? If a state court eviction or similar proceeding is available, must such proceeding be utilized before resort to self-help?

Certainly it will be possible to fashion workable rules to guide state bureaucracies and potential litigants. The burdens of following due process are minimal, especially because this Court has recognized the flexibility in precisely what due process is accorded. Moreover, due process is often self-effectuating. Its mere existence is frequently sufficient to assure that state bureaucrats observe minimum procedural standards.

B. Pennhurst Heightens the Importance of Insuring That State Agencies Obey Procedural Constitutional Standards

Pennhurst State School & Hospital v. Halderman, ... U.S. ....., 52 U.S.L.W. 4155 (1984) recently foreclosed certain judicial options available to residents of state-run facilities. Under *Pennhurst,* when an institution is managed improperly under state law, the appropriate forum is the state and not federal court. The problem of deteriorating state-run facilities is a growing one in an era of limited tax resources and emphasis on community-based facilities for the elderly. However, nothing in *Pennhurst* mandated a retreat from the minimum procedural standards so often reiterated by the Court. Indeed, if residents of state-run facilities are not permitted substantively to challenge in federal court the mismanagement of such institutions, it is even more critical that men and women forced to live in such homes be provided that minimum protection offered by due process when such a facility is terminated. Long-standing procedural due process safeguards must not be eroded precisely as forum availability becomes more limited. To do otherwise is to literally invite state agencies to bypass minimum standards of a civilized society.

C. The Prison Cases Decided by This Court Are Not the Standard for Governmental Transfer of Residents in Nursing Homes and Similar Facilities

Respondent's citation of the prison cases, including *Meachum v. Fano,* 427 U.S. 215 (1976) and *Connecticut Board of Prisons v. Dumschat,* 452 U.S. 458 (1981), to justify at-will government transfers of elderly people, without any due process, provides an additional reason for a grant of this petition.

The Ninth Circuit relied on *Dumschat* for the proposition that due process restrictions do not apply to governmental action in closing a state institution. App. at A-25. However,

Dumschat specifically applied only to prison inmates whose liberty interests and due process rights have largely been extinguished by a criminal conviction. *See Meacham,* 427 U.S. at 224 (Stevens, J.) As Justice Burger clearly stated in *Dumschat:*

> "In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope. (Citations omitted.)

The Ninth Circuit errs in concluding that Chief Justice Burger's ruling with respect to convicted felons applies to disabled citizens in a government-run home. This dangerous extension of the prison transfer cases also represents a serious misunderstanding of the reasoning of Justice Blackmun in *Olim v. Wakinekona,* ..... U.S. ....., 103 S.Ct. 1741 (1983) and the majority opinion of Justice Rehnquist in *Hewitt v. Helms,* ..... U.S. ....., 103 S.Ct. 864 (1983).

Finally, reliance on these cases fails to take into consideration the weighing of special policy considerations applicable only to the particular security concerns of prison administrators and the particular characteristics of the prison population. Thus, this Court's approval of discretionary decisions by prison officials that result in inmate transfers has flowed from the recognition "that lawfully incarcerated persons retain only a narrow range of protected liberty interests." 103 S.Ct. at 869 (Rehnquist, J.) Further, prior decisions of this Court "have consistently refused to recognize more than the most basic liberty interests in prisoners." *Id.* The Ninth Circuit's failure to recognize that different considerations might apply to the transfer of convicted felons than to the transfer of elderly citizens in other government-run institutions has not heretofore been sanctioned by this Court.

D. The Extent to Which Due Process Applies to Closures of State-Run Facilities Merits Clarification by This Court

Petitioners certainly agree that a state government is free to close down state nursing homes. However, what is required are practical rules which allow a bureaucracy to terminate such a facility consistent with some minimum constitutional protection for its inhabitants. There was no reason for Respondent to ever put Petitioners' lives in danger. Given the uncertainty of the law in this field, only this Court can now offer some measure of protection to the inhabitants of government facilities.

It seems clear that this Court did not intend O'Bannon to be dispositive of whether transfer trauma can exist where elderly persons are moved. All that *O'Bannon* decided was that under the facts of that case the plaintiffs had not established such a claim. The Ninth Circuit decision in this case, however, would foreclose any orderly development of the law on this issue even though the "state admits . . . and the record reveals that the transfer trauma issue was disputed before the district court," App. at A-18. The Ninth Circuit in effect disagrees with the Second Circuit in *Yaretsky v. Blum,* 629 F.2d 817 (2d Cir. 1980),[2] *rev'd on other grounds,* 457 U.S. 991 (1982), and finds such evidence constitutionally irrelevant under *O'Bannon.* App. at A-18-A-19.

In an attempt to obliterate the *O'Bannon* direct-indirect distinction, the Ninth Circuit fails to address the situation, as here, where the state (and not some private third party)

[2]In *Yaretsky,* the Second Circuit held that Medicaid patients' interest in avoiding the effects of transfer trauma is a constitutionally protected liberty interest where such trauma results from the transfer of a patient from a lower to a higher level of care within existing Medicaid nursing homes. 629 F.2d at 821. The fact that transfer trauma is life threatening has been recognized by the lower courts, *Bracco v. Lackner,* 462 F.Supp. 436 (N.D.Cal. 1978); *Klein v. Matthews,* 430 F.Supp. 1005 (D.N.J. 1977), including the first Ninth Circuit panel that heard this case. App. at A-9.

allowed the nursing home to deteriorate. Hence, Respondent, with its references to closing "the dilapidated treatment facility" (Brief of Respondent at 4) ignores the fact that if the indirect-direct distinction is not adhered to, agencies are actually encouraged to allow facilities to deteriorate and then to terminate the facility on the excuse that they have become "unsafe." Even if such state bureaucracies are permitted to do this, at least minimum due process procedures must be followed.[3]

Respondent states that Petitioners "voluntarily chose to remain" after the bureaucracy stated that it would close the facility. Brief of Respondent at 6. To describe people who find it psychologically difficult to live in the population at large (RT 300:25-320:9), who suffer deformities (RT 300:13-19), and who have treated a residence as their home for decades, as blameworthy, is not a reasonable characterization. Moreover, because Respondent had available summary judicial proceedings to remove them if he believed he had such a right, Petitioners, who claimed a legal right to remain, reasonably believed that they were entitled to stay until conflicting claims were adjudicated.

The position of the Ninth Circuit is that so long as Hawaii law is silent on limiting the discretion of a state bureaucracy, the bureaucracy can act as it pleases with respect to its patients and no constitutional rights can be implicated.

Independently of what state law may provide, Petitioners nevertheless have many separate constitutional

---

[3]Respondent argues that due process was accorded below by a series of meetings, almost all of which were held after the decision was actually made. Petitioners' position was that because the decision to close the facility was made by Governor Ariyoshi without respect to any "hearings" (RT 515:21-516:17; 525:8), such meetings were irrelevant. Suffice it to say that this was a disputed issue of fact not reached by the Ninth Circuit, which held that "we therefore need not decide whether the patients were afforded sufficient notice nd hearings to satisfy the Fourteenth Amendment" (App. at A-27).

claims. These include their claim to be free of life threatening force imposed by the state in a non-emergency situation. If this Court permits such force to be used by a government bureaucracy, Petitioners contend that they have the right to due process before the imposition of such coercive tactics. In addition, Petitioners were never given the opportunity to demonstrate their vulnerability to increased morbidity and mortality rates by virtue of transfer trauma. Moreover, as the first Ninth Circuit panel recognized (App. at A-7), Petitioners' history of forcible long term confinement at the hands of the state and their entitlement under federal and state law to treatment at some facility requires some reasonable measure of due process. Finally, in a situation in which all utilities and help are terminated and a facility is shut down with people still inside, then Petitioners have been subjected to not just a mere "transfer" but to a reduction or termination of benefits.

CONCLUSION

This Court has held that "[w]hile the contours of this historic liberty interest . . . have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment" (citations omitted). *Ingraham v. Wright,* 430 U.S. 651, 673 (1977). This constitutionally protected liberty interest calls for definitive resolution by this Court. Petitioners urge that their petition be granted.

DATED: San Francisco, California, June 21, 1984.

Respectfully submitted,

SIDNEY M. WOLINSKY
COUNSEL OF RECORD
ANITA P. ARRIOLA
Public Advocates, Inc.
ROBERT M. HARRIS
HARRIS & SMITH
Counsel for Petitioners